No. 10-785

In the Supreme Court of the United States

MEGAN KRAINSKI,

Petitioner,

v.

NEVADA, EX REL. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, ON BEHALF OF THE UNIVERSITY OF NEVADA, LAS VEGAS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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February 14, 2011

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QUESTIONS PRESENTED

I. Whether Petitioner, as the plaintiff in District Court, pled only bare assertions and conclusory allegations, resulting in a failure to state a claim upon which relief could be granted in accordance with this Court's standard of review established in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007) and *Ashcroft v. Iqbal*, ____ U.S. ____, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

II. Whether Petitioner, as the plaintiff in District Court, pled factual matter that, if taken as true, states a claim that Respondents, in their individual capacities, deprived her of a clearly established constitutional right?

III. Whether Petitioner's failure to properly raise the issue of leave to amend before the District Court and more significantly, failure to actually set forth any facts which might support a leave to amend, warranted denial of leave to amend.

LIST OF PARTIES

Petitioner has accurately presented a list of all parties to the proceeding in the court whose judgment is under review and, as such, Respondents incorporate Petitioner's Rule 14.1(b) Statement. (Petitioner's Petition for Writ of Certiorari, hereinafter referred to as "Pet" or "Petition" p.ii).

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CITATIONS OF OFFICIAL/UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS

Petitioner has accurately presented the citations of the official and unofficial reports of all opinions and orders entered in this case by courts and administrative agencies and, as such, Respondents incorporate Petitioner's "Opinions Below" Statement. (Pet. p.1).

CONCISE STATEMENT OF BASIS FOR JURISDICTION

Petitioner has accurately presented the basis for jurisdiction of this Court, including the statutory provisions and time facts on which jurisdiction rests and, as such, Respondents incorporate Petitioner's "Jurisdiction" Statement. (Pet. p.1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to statutory provision 42 U.S.C. § 1983, referenced to by Petitioner (Pet. p. 2), the Fourth Amendment of the U.S. Constitution is also involved in this case.

I.

STATEMENT OF THE CASE

Statement of the Case

Respondents' refer to and incorporate the summary of the procedural history and facts set forth by the majority of the Ninth Circuit Court of Appeals below in *Krainski v. NSHE et al.*, 616 F.3d 963, 965-967 (9th Cir. 2010).

Misstatements of in Petition

Respondents do, pursuant to Rule 15.2, point out misstatements of fact or law in the Petition that bear on what issues would be before the Court if certiorari were granted.

Contrary to Petitioner's assertion, the District Court provided a detailed analysis and explanation of its decision at the time of the hearing on Respondent's Motion to Dismiss. (RA, 70b-73b). Moreover, during the hearing Petitioner asked the Court to reconsider its position on the Fourth Amendment claim and substantive due process claim. (RA, 75b). Lastly, Petitioner failed to raise the request for leave to amend at all during the hearing (RA, 68b-79b) or following the hearing via a motion for reconsideration. The District Court's Order of October 20, 2008, simply memorialized the analysis provided to the parties during the hearing on the Motion to Dismiss. (Petitioner's Appendix, 23-27).

Petitioner's request to amend, included in her Opposition to Defendants' Motion to Dismiss, was not

clearly stated or sufficiently supported and failed to comply with the local rules[1] requiring the moving party to attach the proposed amended pleading to any motion. (Respondents' Appendix, hereinafter "RA," 66b-67b). Petitioner's request was a "naked" request made in passing without any support. *Id.* Other than including the passing reference in her Opposition, Petitioner failed to provide the District Court with notice of the basis for the request, including any statements whatsoever regarding what the proposed amendment might look like. *Id.*

Petitioner's misrepresents the allegations Petitioner pled in her own Complaint. Contrary to Petitioner's assertion, she did not plead "continuous and unyielding harassment and threats made by Polee to Krainski." (Petition, p.8). Petitioner actually pled that she met with the University employee, Respondent Leslie Wallenfeldt, and advised her of "on-going harassing and threatening behavior by [Petitioner's] roommate." *Krainski v. Polee*, 616 F.3d at 966. In several places within the Petition she asserts allegations that never appeared in her Complaint or on appeal before the Ninth Circuit. It is only now, in the Petition, that Petitioner sets forth the following allegation, four separate times: "and that no physical evidence of an attack existed whatsoever." (Pet. p.9; pp.12-13; p.14).

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[1] Local Rule 15-1(a):
Unless otherwise permitted by the court, the moving party shall attach the proposed amended pleading to any motion to amend so that it will be complete in itself without reference to the superseding pleading. An amended pleading shall include copies of all exhibits referred to in such pleading.

Missing from the Petition is an accurate summary of the criminal proceedings. Petitioner was arrested for the crime of Assault with a Deadly Weapon. *Krainski*, 616 F.3d at 966. Petitioner subsequently entered into a plea deal, which involved a submittal on the record wherein Petitioner pled guilty to a reduced crime of misdemeanor Disorderly Conduct, which would be dismissed upon her completion of impulse control counseling. (RA, 72b).

Misstatements of Law in Petition

The decision of the Ninth Circuit panel is in accord with governing legal principles set by this Court regarding qualified immunity and the standard of review on a motion to dismiss. *See* Argument, Section III, A, below. The decision of the Ninth Circuit corresponds with *Bell Atl. Corp. v. Twombly* and *Ashcroft v. Iqbal*, holding that threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice to overcome a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007); *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

II.

THE OPINIONS BELOW

The District Court granted Respondents' Motion to Dismiss. The Eleventh Amendment immunity barred Petitioner's constitutional claims against UNLV and the UNLV Employees in their official capacities. *Krainski*, 616 F.3d at 967-968. Qualified immunity barred Petitioner's federal claims against the UNLV

Employees in their individual capacities. The District Court also found Petitioner failed to make out federal claims for Fourteenth Amendment procedural due process, having alleged that she received some notice and hearing; substantive due process, having failed to allege a violation of a cognizable fundamental liberty or property interest; or violation of the Fourth Amendment relative to search and seizure, having pled facts constituting probable cause to arrest her by the police officer defendants employed by the University. (Pet. App. 23-27). The District Court having dismissed Petitioner's federal claims, with prejudice, declined to exercise jurisdiction over the remaining state law claims and therefore dismissed such claims without prejudice to Petitioner's right to bring them in state court. *Id.*

The Ninth Circuit Court of Appeals panel affirmed the District Court's dismissal of Petitioner's constitutional claims against UNLV and UNLV Employees in their official capacities. *Krainski*, 616 F.3d at 967-968. The Ninth Circuit panel further affirmed the District Court's dismissal of Petitioner's theory under *Monell v. Dep't of Social Servs. of N.Y.*,[2] that her constitutional rights were infringed by a "de facto policy" of UNLV and the UNLV Employees in accordance with this Court's express decline to extend *Monell's* theory of municipal liability under § 1983 to state entities or state officials. *Id.* at 968 (citations omitted).

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[2] 436 U.S. 658, 690 n.55, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

A majority of the Ninth Circuit panel affirmed the District Court's dismissal of Petitioner's Fourth Amendment claim against Respondents because Respondent police officers were entitled to qualified immunity in that, "'a reasonable police officer could have believed that his or her conduct was lawful' when arresting a suspect following a report from two University employees and the student alleging an attack." *Id.* at 969.

There was a two to one decision, with a Justice dissenting, in part, with regards to dismissal of Petitioner's Fourth Amendment claim. The dissenting Justice indicated the conclusory allegations made by Petitioner in her Complaint: that the UNLV police officers knew or should have known, that the allegations [against Petitioner] were false, were sufficiently pled. (Pet. App. 18). Respectfully, the dissent misapplied the principles enunciated by this Court in *Bell Atl. Corp. v. Twombly*, and *Ashcroft v. Iqbal*, which are addressed below. The Justice further dissented, in part, with regards to the issue of leave to amend, which Petitioner failed to properly place before the District Court, but which even if considered, failed to set forth any factual basis whatsoever to support a leave to amend, and for which Petitioner actually did not ever set forth any new facts that she could include in her Complaint to avoid its shortcomings.

The Ninth Circuit affirmed the District Court's dismissal of Petitioner's substantive and procedural due process claims based upon qualified immunity as the contours of the right asserted by Petitioner were not sufficiently clear that a reasonable person would understand that what he or she is doing violates that

right. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 821, 172 L. Ed. 2d 565 (2009).

Lastly, the Ninth Circuit majority affirmed the District Court's decision to dismiss the federal claims with prejudice and denial of leave to amend Petitioner's Complaint. Frankly, Petitioner's Complaint failed to contain sufficient factual matter to state a facially plausible claim to relief. *Ashcroft v. Iqbal*, 129 S. Ct. at 1949. No new facts were presented to the District Court by Petitioner that she could include in her complaint to overcome its shortcomings. Even at the late stage of oral argument before the Ninth Circuit the best Petitioner could come up with was more conclusory allegations.[3] Even considering those conclusory allegations, they did not constitute facts under this Court's enunciated standards, which properly led to the affirming of the District Court's denial of leave to amend.

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[3] We are certainly aware of many more facts now than we were when we first drafted the complaint. So essentially, the allegations we could add to the complaint at this point is to be more specific about the actual conspiracy that took place, who it occurred between, what school officials were actually involved with this.

Krainski, 616 F.3d 963 at 973.

III.

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT COURT'S DECISION TO DISMISS PETITIONER'S COMPLAINT BASED UPON *BELL ATL. CORP. V. TROWMBLY AND ASHCROFT V. IQBAL*, AS WELL AS PRINCIPLES OF QUALIFIED IMMUNITY, WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

Petitioner seeks review of his case by writ of certiorari, arguing that the court of appeals' decision regarding dismissal of her Fourth Amendment claim, and denial of leave to amend, was contrary to federal law. Petitioner asserts that a higher pleading standard was required for her claims and that she should have been granted leave to amend despite having set forth no factual support for such leave to amend. (Pet. 11-14 and 15-18).

The petition should be denied, however, because the questions Petitioner presents are not accurately reflective of the decision below. Rather, both the district court and court of appeals correctly concluded that Respondents were entitled to qualified immunity as to Petitioner's Fourth Amendment claim. (Pet. App. 10-11 and 26-27). The court of appeals included in its opinion discussion of the issue of leave to amend that Petitioner failed to set forth sufficient factual matter to state a facially plausible claim to relief, because she presented no new facts to overcome the shortcomings of the Complaint.

A. The Ninth Circuit Court of Appeals Majority Correctly Applied Governing U.S. Supreme Court Pleading Standards

The Ninth Circuit did not establish a heightened pleading standard for Section 1983 cases. Rather, the Ninth Circuit simply correctly applied the principles set forth by this Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544.

Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although the "short and plain statement" requirement "does not require 'detailed factual allegations,'...it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949. "A pleading that offers 'labels and conclusions,' or a 'formulaic recitation of the elements of a cause of action will not do.'... Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 129 S. Ct. at 1949 (*citing Twombly*, 550 U.S. at 557)).

Frankly, Petitioner alleged, at best, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, which do not suffice. *Iqbal*, 129 S. Ct. at 1950. Petitioner's Complaint alleged Respondent UNLV police Officers Goff, Tramposch and Culver violated her Fourth Amendment right to be free from warrantless arrest absent probable cause. Petitioner failed to allege facts that supported her legal contentions that her arrest lacked probable cause. Petitioner failed to allege facts that supported her legal contention that the police officers "knew or should have known the allegations

made by victim Polee" were false. Petitioner failed to allege facts to suggest UNLV police officers had any reason to disbelieve the statements made by the victim and the two University employees that Petitioner attacked Polee with scissors. Petitioner pled:

> 28. Defendants Wallenfeldt, Pini and Polee then contacted UNLV Police and made false statements to police officer (sic) in an attempt to have Plaintiff arrested.
>
> 29/49. Defendant Officers Goff, Tramposch and Culver, knew, or should have known, that the allegations made by Defendant Polee were false, but arrested Plaintiff for the alleged crime of Assault with a Deadly Weapon;
>
> 30/50. Prior to making the arrest, Defendant Officers Goff, Tramposch, and Culver did not conduct any investigation into the claims made by Defendant Polee, and had no probable cause or warrant to arrest Plaintiff.

(Pet. App. 4). The tenet that a court must accept as true all of the allegations contained in a complaint is **inapplicable to legal conclusions**. *Iqbal*, 129 S. Ct. at 1949 (emphasis added). The Court is not bound to accept as true a legal conclusion couched as a factual allegation. *Id.* While legal conclusions can provide a framework of a complaint, they must be supported by factual allegations. *Id.* Petitioner's bare assertions amounted to nothing more than a "formulaic recitation of the elements," for a Fourth Amendment claim and conclusory allegations are not entitled to be assumed true. *Id.* at 1951.

Because the arresting officers are protected by qualified immunity, and because Petitioner did not allege facts that showed a clear violation of the Fourth Amendment, Petitioner's claim of Fourth Amendment violation was properly dismissed. Pursuant to *Twombly* and *Iqbal*, the Court is to consider the factual allegations in Petitioner's complaint to determine if they plausibly suggest an entitlement to relief. Here, Petitioner's Complaint alleges "Defendants Wallenfeldt, Pini and Polee contacted UNLV Police and made false statements to the police officer (sic) in an attempt to have Plaintiff arrested." (Pet. App. 4). Even assuming the few well pleaded facts gave rise to a plausible inference that UNLV Police Officers lacked probable cause, it is not necessary to reach whether or not probable cause was lacking because assuming the police officers were mistaken, there is no law that would have made it clear to a reasonable officer in these officers' position that their assessment of probable cause violated Petitioner's constitutional rights. Thus, under the standards of *Twombly* and *Iqbal*, Petitioner, failed to allege more by way of factual content to "nudg[e]" her claim of Fourth Amendment violation "across the line from conceivable to plausible." *Id.* at 1952. Moreover, the police officers would still be entitled to qualified immunity based on their objectively reasonable, albeit mistaken, belief that there was probable case. *Hunter v. Bryant*, 502 U.S. 224, 227-29, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam).

B. The Ninth Circuit Court of Appeals Majority Correctly Applied Governing U.S. Supreme Court Qualified Immunity Principles

UNLV police officers, arrested Petitioner, a suspect, following a report from Polee, the student alleging attack, and two UNLV employees indicating that Plaintiff had attacked Polee with a pair of scissors. The UNLV police officers were properly entitled to qualified immunity from 42 U.S.C. 1983 suit, because taken in light most favorable to Petitioner, the facts alleged demonstrated a reasonable police officer could have reasonably believed the arrest was lawful. The doctrine of qualified immunity protects government officials from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

Because qualified immunity is "an immunity from suit rather than mere defense to liability," this Court has "repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). *Harlow*, 457 U.S. at 818; *Pearson v. Callahan*, 129 S. Ct. 808, 815.

Determining whether officials are owed qualified immunity involves two inquiries: (1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right; and (2) if so, whether the right was clearly established in light of the specific context of the case. *Saucier v. Katz*, 533 U.S. 194, 201,

121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *overruled by Pearson v. Callahan*, 129 S. Ct. at 818 (holding it is within a Court's sound discretion to address these two prongs in any sequence they see fit). "For a constitutional right to be clearly established, 'its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right' at the time of his conduct." *Anderson v. Creighton*, 438 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

UNLV police officers are entitled to immunity if a reasonable officer could have believed probable cause existed to arrest Petitioner. Probable cause existed if "at the moment the arrest was made, the officers had probable cause to make it – whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142 (1964); *Henry v. United States*, 361 U.S. 98, 102, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959).

No constitutional violation occurred in this case because the police officers arrested Petitioner based on information from three people. Petitioner admittedly pled that UNLV police officers Goff, Tramposch, and Culver arrested Petitioner based upon information derived from statements of the student who reported the attack, Polee, and two University officials, Tyree Pini and Leslie Wallenfeldt that Petitioner had attacked Polee with a pair of scissors. (Pet. App. 4). Petitioner included bare allegations in her Complaint

that the officers "knew or should have known, that the allegations....were false" (Pet. App. 4) but failed to allege in either her complaint or at oral argument before the District Court or the Ninth Circuit any facts suggesting that the police officers had a reason to disbelieve or suspect that the statements made by the victim and the two other university employees were false.

Even assuming, *arguendo*, that the police officers erred in concluding that probable cause existed to arrest Petitioner, the police officers nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken. Qualified immunity shields UNLV police officers Goff, Tramposch and Culver from suit for damages if a reasonable officer could have believed [Petitioner Krainski's] arrest to be lawful, in light of clearly established law and the information the [arresting] officers possessed. *Hunter*, 502 U.S. at 227. "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to qualified immunity." *Id.*, *Pearson v. Callahan*, 129 S. Ct. at 815 ("The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'"). Accordingly, the UNLV police officers were properly entitled to qualified immunity as to Petitioner's Fourth Amendment claim.

C. The Ninth Circuit Court of Appeals Majority Correctly Determined Petitioner Failed to Set Forth New Facts Before the District Court, and for that matter, the Ninth Circuit, Which Petitioner Could Include in her Complaint to Overcome its Fatal Shortcomings

On the next to the last page of her Opposition to Defendants' Motion to Dismiss, Petitioner requested the following:

> In the unlikely event that this Court was to find any of Plaintiff's causes of action insufficient, leave to amend is graciously requested. Plaintiff strongly believes that this Court could 'conceive of facts' that would render his (sic) claims valid, if he (sic) were permitted to amend.

(RA, 66b-67b).

When a party files a **proper motion for leave to amend**, rule 15(a) further provides "leave shall be freely given when justice so requires (emphasis added)." Fed. R. Civ. P. 15(a); *see also Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962); *see generally* 6 Charles Alan Wright et al., Federal Practice and Procedure §§1473 & 1483 (3d ed. 2010). The liberal granting of motions for leave to amend reflects the basic policy that pleadings should enable a claim to be heard on its merits. *See Foman*, 371 U.S. at 181-82; 6 Wright et al., *supra* §1473 at 601-602. This policy is not limitless and must be balanced against Fed. R. Civ. P 7(b)(1) which governs the requirements for all motions and provides that any

motion must "be in writing . . . ; state with particularity the grounds for seeking the order . . . ; and state the relief sought." *See also* 5 Wright & Miller, *supra* § 1191 at 50-51 (3d ed. 2004). By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and ensuring that "the court can comprehend the basis of the motion and deal with it fairly." 5 Wright & Miller, *supra* § 1192 at 56; *see also id.* § 1191 at 50. The District Court has wide discretion to recognize a motion for leave to amend in the interest of a just, fair or early resolution of litigation. *See id.*, § 1194.

Many districts, including Nevada,[4] have local rules requiring the moving party to submit a copy of the amended pleading with the motion for leave. *See, e.g., Thomas v. R.I.*, 542 F.3d 944, 950, 71 Fed. R. Serv. 3d 944 (1st Cir. 2008) (discussing failure to comply with local rule); *United States ex. rel. Lee v. Fairview Health Sys.*, 413 F.3d 748, 750 (8th Cir. 2005) (noting plaintiff's failure to comply with local rule requiring submission of copy of amended complaint); *Lemmons v. Georgetown Univ. Hosp.*, 241 F.R.D. 15, 30, 100 Fair Empl. Prac. Cas. (BNA) 563, 89 Empl. Prac. Dec. (CCH) P 42,777 (D.D.C. 2007) (local rule requires submission of proposed amendment); *Romero v. Wilson Elementary Sch. Distr. No. 7*, No. CV 05-2231-PHX-MHM, 2006 U.S. Dist. LEXIS 57652, 3-4, 2006 WL 2374844, 2 (D. Ariz. Aug. 15, 2006) (noting local rule requiring parties to file a notice identifying the differences between the original and amended pleadings and submit a "strike-through" version of the

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[4] *See footnote 1, supra.*

proposed amendment); *United States v. 3 Parcels in La Plata Cnty.*, 919 F. Supp. 1449, 1457, 1995 U.S. Dist. LEXIS 20664, 22 (D. Nev. 1999) (No proposed amended pleadings accompanied the party's motion. That failure alone required the court to deny the party's motion to amend his claim and answer).

The court of appeals properly affirmed denial of Petitioner's request for leave to amend because the Complaint lacked sufficient factual matter to state a facially plausible claim to relief, and no new facts were ever presented by Petitioner to demonstrate she could remedy the Complaint's shortcomings. Petitioner mentioned a request for leave to amend on the next to the last page of her Opposition to the Defendants' Motion to Dismiss. (RA, 66b-67b). The request for leave to amend was not clearly stated nor sufficiently supported and failed to comply with the local rules requiring the moving party to attach the proposed amended pleading to any motion. Instead, Petitioner's request was a "naked" request made in passing without any support. Other than including the passing reference in her Opposition, Petitioner failed to provide the District Court with notice of the basis for the request, including any statements whatsoever regarding what the proposed amendment might look like. District Courts are surely not required to engage in independent research or read the minds of litigants to determine if information justifying an amendment exists.

Petitioner's request lacked a statement for the grounds for amendment and dangled at the end of her Opposition to the Defendants' Motion to Dismiss and simply did not rise to the level of a motion for leave to amend. Because the motion for leave to amend was

never properly before it, the District Court did not abuse its discretion is failing to address Petitioner's request for leave to amend.

Moreover, even if the Court overlooked this procedural defect, the District Court's decision to grant the motion to dismiss was sound. At the actual hearing (October 14, 2008) before the District Court on the Defendants' Motion to Dismiss, Petitioner did not suggest that she wanted to amend her complaint to add facts to the Fourth Amendment claim. (RA, 74b-75b). On appeal, before the Ninth Circuit, Petitioner stated at oral argument (December 3, 2009):

> We are certainly **aware of many more facts now** than we were when we first drafted the complaint. So essentially, the allegations we could add to the complaint at this point is to be more specific about the actual conspiracy that took place, who it occurred between, what school officials were actually involved.

(Pet. App. 21).

However, Petitioner did not state she was aware of "facts" at the time of the District Court hearing or that she brought these "facts" forth to the District Court's attention. More importantly, and fatally, at oral argument before the Ninth Circuit, Petitioner failed to specify what "facts" she claimed to have.

Petitioner failed to raise the issue of amendment during the hearing before the District Court. Petitioner certainly had an opportunity to present all of her arguments before the Court, and certainly did so. In fact, Petitioner even requested the District

Court reconsider its position of the Fourth Amendment and substantive due process claims. (RA, 75b-76b). The District Court listened to Petitioner's arguments and in view of the dialogue, did in fact reconsider but was not moved by Petitioner's argument. *Id.* Significantly, Petitioner failed to raise the issue of amendment during the hearing. (RA, 68b-79b).

Instead, Petitioner essentially demands that the District Court should have *sua sponte* raised the leave to amend issue when she failed to follow the rules, failed to raise it during oral argument on the Defendants' Motion to Dismiss; and failed to bring it properly before the Court. Assuming Petitioner had made the claim to the District Court, as she boldly made before the Ninth Circuit, **there are simply no facts pled** (emphasis added). To survive a motion dismiss, a complaint must contain sufficient factual matter to state a facially plausible claim to relief. *Iqbal*, 129 S. Ct. at 1949. Although the "short and plain statement" of Rule 8 does not require "'detailed factual allegations,'...it demands more than an unadorned, the defendant-harmed-me accusation." *Id.* No new facts were ever actually presented by Petitioner to overcome any of the shortcomings of the Complaint.

IV.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents
State of Nevada ex. rel. Board of Regents of the Nevada System of Higher Education on behalf of the University of Nevada, Las Vegas; Rebecca Mills; Richard Clark; Phillip Burns; Nannette Jimenez; Tyree Pini; Officer L. Tramposch; Officer B. Gott; Officer J. Culver; Susan M. Carrasco; and Leslie Wallenfeldt

APPENDIX

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APPENDIX A

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
* * * * *

CASE:

[Filed April 2, 2008]

MEGAN KRAINSKI,

Plaintiff,

v.

THE STATE OF NEVADA. ex. Rel. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of the UNIVERSITY OF NEVADA, LAS VEGAS; a Political Subdivision of the State of Nevada; REBECCA MILLS, individually and as Vice President for Student Life of the University of Nevada, Las Vegas; RICHARD CLARK,

individually and as Director of Student Conduct and Residential Life of the University of Nevada, Las Vegas; PHILLIP BURNS, individually and as Senior Student Conduct Officer of the University of Nevada, Las Vegas; NANNETTE JIMENEZ, individually and as a Student Conduct Officer of the University of Nevada, Las Vegas; SUSAN M. CARRASCO, individually and as Assistant General Counsel of the University of Nevada, Las Vegas; TYREE PINI, individually and as Assistant Residential Life Coordinator; LESLIE WALLENFELDT, individually and as Residential Life Coordinator of the University of Nevada, Las Vegas; OFFICER BRETT GOFF, P#302, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER L. TRAMPOSCH, P#312, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER J. CULVER, P#309, individually and as a police officer with the University of Nevada, Las Vegas Police Department; KENYA POLEE, individually; DOES I-XX, inclusive,

Defendants.

COMPLAINT
(Jury Demanded)

COMES NOW, Plaintiff, MEGAN KRAINSKI (hereinafter referred to as "Plaintiff"), by and through her attorney of record, JASON J. BACH, ESQ. of THE BACH LAW FIRM, LLC, and hereby complains and

alleges against the above-named Defendants, and each of them, based upon knowledge, information and a reasonable belief derived therefrom, as follows:

INTRODUCTION

This is a Complaint for Damages and Declaratory Judgment, pursuant to Fed. R. Civ. P. 57, brought by a student of the University of Nevada, Las Vegas. The claims, against the University System, the University, the Vice President, Attorneys, Employees and Officers of this public university, are based upon 42 U.S.C. Section 1983 and the Fourth, Fifth, and Fourteenth Amendment of the United States Constitution, alleging infringement of Plaintiff's right to substantive and procedural due process, and right to be free of false arrest and imprisonment, and malicious prosecution. Plaintiff also relies on the University's Student Conduct Code and alleges a pendent breach of contract claim. Plaintiff has also asserted a claim against all Defendants for negligent hiring, training, and supervision, intentional and negligent infliction of emotional distress, civil conspiracy, abuse of process, defamation, slander, libel, and injunctive and declaratory relief.

PARTIES & JURISDICTION

1. This Court has jurisdiction over the claims set forth in this action pursuant to 28 U.S.C. Section 1331 (federal question) and 28 U.S.C. Section 1343 (civil rights).

2. Supplemental jurisdiction over Plaintiff's pendent state law claims is invoked pursuant to 28 U.S.C. Section 1367, as the claim arises out of the

same transaction and occurrence as Plaintiff's federal claim.

3. Venue is proper in the District of Nevada pursuant to 28 U.S.C. 1391(b) in that the claims arose in this district, and Plaintiffs and Defendants are located in this district.

4. Costs, expert witness fees, and attorney's fees are sought pursuant to 42 U.S.C. Section 1988.

5. Plaintiff is currently a resident of the State of Nevada, and at all relevant times, was a student at the University of Nevada, Las Vegas.

6. Defendant THE STATE OF NEVADA, ex. Rel. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of the UNIVERSITY OF NEVADA, LAS VEGAS is a political subdivision of the State of Nevada and operates the University of Nevada, Las Vegas (hereinafter referred to as "UNLV"), a public educational institution of higher learning.

7. Defendant REBECCA MILLS is the Vice President for Student Life at UNLV. She is named in this case both individually and in her official capacity as Vice President for Student Life at UNLV.

8. Defendant RICHARD CLARK is the Director of Student Conduct and Residential Life at UNLV. He is named in this case both individually and in his official capacity as Director of Student Conduct and Residential Life at UNLV.

9. Defendant PHILLIP BURNS is the Senior Student Conduct Officer at UNLV. He is named in this case both individually and in his official capacity as Senior Student Conduct Officer at UNLV.

10. Defendant NANNETTE JIMENEZ is a Student Conduct Officer at UNLV. She is named in this case both individually and in her official capacity as a Student Conduct Officer at UNLV.

11. Defendant SUSAN M. CARRASCO is the Assistant General Counsel at UNLV. She is named in this case both individually and in her official capacity as Assistant General Counsel at UNLV.

12. Defendant TYREE PINI is the Assistant Residential Life Coordinator at UNLV. He is named in this case both individually and in his official capacity as Assistant Residential Life Coordinator at UNLV.

13. Defendant LESLIE WALLENFELDT is the Residential Life Coordinator at UNLV. She is named in this case both individually and in her official capacity as Residential Life Coordinator at UNLV.

14. Defendant OFFICER BRETT GOFF P#302 is a police officer with the UNLV Police Department. He is named in this case both individually and in his official capacity as a police officer at UNLV.

15. Defendant OFFICER L. TRAMPOSCH P#312 is a police officer with the UNLV Police Department. He is named in this case both individually and in his official capacity as a police officer at UNLV.

16. Defendant OFFICER J. CULVER P#309 is a police officer with the UNLV Police Department. He is named in this case both individually and in his official capacity as a police officer at UNLV.

17. Defendant KENYA POLEE is, at all times relevant, believed to be a resident of the State of Nevada.

18. That the true names or capacities, whether individual, corporate, associate or otherwise, of Defendants DOES I through XX are unknown to Plaintiff, who therefore, sues said Defendants by such fictitious names.

19. Plaintiff is informed and believes and thereon alleges that each of the Defendants designated herein as DOES are responsible in some manner for the events and happenings referred to in this action and proximately caused damages to Plaintiff as herein alleged, and that Plaintiff will ask leave of this Court to amend this Complaint, to insert the true names and capacities of said Defendants, and when the same have been ascertained to join such Defendants in this action.

20. At all times herein, the individual Defendants, with the exception of Defendant POLEE and the Defendant UNLV, have been acting under color of law.

21. At all times relevant hereto, and in all their actions described herein, Defendants' actions took place in the State of Nevada, County of Clark.

22. Defendants, and each of them, did the acts and omissions hereinafter alleged in bad faith and with knowledge that their conduct violated well established and settled law.

GENERAL FACTUAL ALLEGATIONS

23. Plaintiff enrolled as a student at UNLV for the Fall 2007 semester.

24. As Plaintiff was from New Jersey, she elected to reside in Defendant UNLV's campus residential housing.

25. On September 10, 2007, Plaintiff met with Defendant WALLENFELDT and advised her of on-going harassing and threatening behavior by Plaintiff's roommate, Defendant POLEE.

26. Defendant POLEE is a prominent student-athlete at UNLV, listed on the University's website as "the top long jumper for the Rebels... among the top long jumpers in the MWC (Mountain West Conference)."

27. On September 11, 2007, Defendants WALLENFELDT and PINI contacted Defendant POLEE, without Plaintiff's consent and in breach of confidentiality, and informed her of the allegations made by Plaintiff, and conspired with Defendant POLEE to fabricate a story about Plaintiff attempting to attack POLEE with a pair of scissors, all before Plaintiff would have an opportunity to file a formal complaint against Defendant POLEE.

28. Defendants WALLENFELDT, PINI, and POLEE then contacted UNLV Police and made false statements to police officer in an attempt to have Plaintiff arrested.

29. Defendant Officers GOFF, TRAMPOSCH, and CULVER, knew, or should have known, that the allegations made by Defendant POLEE were false, but arrested Plaintiff for the alleged crime of Assault with a Deadly Weapon.

30. Prior to making the arrest, Defendant Officers GOFF, TRAMPOSCH, and CULVER did not conduct any investigation into the claims made by Defendant POLEE, and had no probable cause or warrant to arrest Plaintiff.

31. Plaintiff was eventually exonerated of all criminal charges in January 2008, but not before she was arrested and incarcerated at the Clark County Detention Center, causing her to lose her liberty and causing severe psychological trauma and physical injury.

32. In October 2007, Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO brought formal charges against Plaintiff for alleged violations of the University of Nevada, Las Vegas Student Conduct Code, including committing an act "that is in violation of federal, state, or local law," "Threatening, assaulting, or causing physical harm to. . . another;" and "Attempting to violate any provision of the Student Conduct Code."

33. Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO failed to provide

Plaintiff with proper notice of the formal hearing, violating her U.S. Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code.

34. Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO held a formal hearing on November 13, 2007, at which time they each failed to allow Plaintiff to be represented and/or assisted by her advisors, despite the explicit representation made by Defendants that Plaintiff would be allowed to be represented and/or assisted by said advisors, intentionally causing Plaintiff to be ineffective at representing herself at said hearing, all in violation of her U.S. Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code.

35. Despite the fact that no evidence was ever presented to support any of the allegations made against Plaintiff, Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO found Plaintiff to be "Responsible" of said charges, completely ignoring the evidence that exonerated Plaintiff, forever tarnishing the educational transcript and record of Plaintiff, as well as causing severe psychological and physical injuries, all in violation of her U.S. Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code.

36. Plaintiff filed a timely appeal of Defendants decision. However, Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO again ignored the facts and dismissed the appeal, all in violation of her U.S. Constitutional Rights, the UNLV

Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code.

37. Defendants have taken said actions against Plaintiff in retaliation for her making a complaint against a star athlete, and further retaliating against her for asserting her rights pursuant to the U.S. Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code.

38. As a result of the above, Defendants, and each of them, have wrongly caused Plaintiff to be sanctioned and for the above-noted sanctions to be wrongly placed on her record, all in violation of her U.S. Constitutional Rights, depriving her of the opportunity to obtain an education and further her career, and inflicting emotional distress and physical injury, all damaging her in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

FIRST CAUSE OF ACTION

CIVIL RIGHTS VIOLATION, DUE PROCESS VIOLATION, FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

39. Paragraphs 1 through 38, inclusive are incorporated by reference.

40. The actions of Defendants resulted from, and were taken, pursuant to a *de facto* policy of Defendant UNLV, which is implemented by Police Officers, Student Conduct Officers, Assistant General Counsels,

Directors of Student Conduct, and by the Vice President for Student Life, and other employees of the said Defendants, all acting under the color of law, who chose to violate Plaintiff's constitutional rights, without rightful authority of law.

41. Supervisory and policy making officers and officials of said Defendants have known the existence of the *de facto* policy described above for a substantial period of time.

42. Despite their knowledge of the said illegal policy and practices, supervisory and policy-making officers and officials of the said Defendants have not taken steps to determine said practices, have not disciplined or otherwise properly supervised the individual employees who engaged in the said practices, have not effectively trained Police Officers, Student Conduct Officers, Directors of Student Conduct, and the Vice President for Student Life with regard to the proper constitutional and statutory limits on the exercise of their authority, and have instead sanctioned the policy and the practices described herein.

43. That the above actions by Defendants have resulted in both the substantive and procedural due process denial of rights, all in violation of the Fifth and Fourteenth Amendment to the United States Constitution.

44. That by reason of the aforesaid actions, Defendants' actions exhibit deliberate indifference to and/or reckless disregard for the constitutional rights of Plaintiff and other similarly situated students, all in violation of the Plaintiff's constitutional rights, and as

a direct and proximate result thereof, the Plaintiff sustained severe damages in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

45. That by reason of the aforesaid actions, Plaintiff is entitled to a Permanent Injunction, prohibiting the Defendants and their agents from placing a hold on her academic transcript or placing any notation of findings or sanctions against her in her student file or upon her transcript.

46. The acts, conduct and behavior of each of the Individual Defendant's was performed knowingly, intentionally, oppressively, and maliciously, by reason of which Plaintiff is entitled to punitive damages in a sum in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

47. It has been necessary for the Plaintiff to obtain the services of an attorney to prosecute this action and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

SECOND CAUSE OF ACTION

UNLAWFUL ARREST AND IMPRISONMENT, UNLAWFUL SEARCH AND SEIZURE, FOURTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

48. Paragraphs 1 through 47, inclusive are incorporated by reference.

49. Defendant Officers GOFF, TRAMPOSCH, and CULVER, knew, or should have known, that the

allegations made by Defendant POLEE were false, but arrested Plaintiff for the alleged crime of Assault with a Deadly Weapon.

50. Prior to making the arrest, Defendant Officers GOFF, TRAMPOSCII, and CULVER did not conduct any investigation into the claims made by Defendant POLEE, and had no probable cause or warrant to arrest Plaintiff.

51. Plaintiff was eventually exonerated of all criminal charges in January 2008, but not before she was arrested and incarcerated at the Clark County Detention Center, causing her to lose her liberty and causing severe psychological trauma and physical injury.

52. The arrest, imprisonment, search and seizure described above was unreasonable and in violation of the Fourth Amendment of the United States Constitution. As a result of these acts, Plaintiff has suffered physical injuries, loss of community reputation, loss of day and future income, and to incur severe financial obligations in order to retain attorneys to seek redress against the unlawful conduct of the Defendants, as well as other painful injuries, deprivation of her liberty, invasion or her privacy, grievous mental suffering, and pain and suffering, all in violation of 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments to the United States Constitution, all to her damage in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

53. The act, conduct and behavior of Defendant Officer's, individually, were performed knowingly and intentionally, oppressively and maliciously, by reason of which Plaintiff is entitled to punitive damages in a sum in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

54. That by reason of the aforesaid actions, Defendants' actions exhibit deliberate indifference to and/or reckless disregard for the constitutional rights of Plaintiff and other similarly situated students, all in violation of the Plaintiff's constitutional rights, and as a direct and proximate result thereof, the Plaintiff sustained severe damages in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

55. It has been necessary for the Plaintiff to obtain the services of an attorney to prosecute this action and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

THIRD CAUSE OF ACTION

BREACH OF CONTRACT

56. Paragraphs 1 through 55, inclusive are incorporated by reference.

57. Plaintiff has an express and implied contract with Defendants in connection with rights explicitly guaranteed by UNLV pursuant to the UNLV Student Conduct Code, NSHE Code, and the UNLV Student Handbook.

58. The actions of Defendants constitute a breach of the express and implied contract.

59. As a result of the breach committed against the Plaintiff, she has been damaged in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

60. That by reason of the aforesaid actions, Plaintiff is entitled to a Permanent injunction prohibiting the Defendants and their agents from placing a hold on her academic transcript, or placing any notation of any findings or sanctions against her in Plaintiff's student file or upon her transcript.

61. It has been necessary for the Plaintiff to obtain the services of an attorney to prosecute this action, and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

FOURTH CAUSE OF ACTION

NEGLIGENCE / NEGLIGENT HIRING, TRAINING, & SUPERVISION

62. Paragraphs 1 through 61, inclusive, are incorporated by reference.

63. At all times material and relevant herein, the Defendants had a duty to not violate the Constitutional rights of their students.

64. At all times relevant herein, Defendant UNLV had a duty not to hire individuals with a propensity towards committing unlawful acts against those who lawfully go about their business, and to

adequately train and supervise their agents, officers, and employees.

65. At all times relevant herein, the Defendant UNLV had a duty to protect the public, such as Plaintiff, from the illegal actions of their own agents, officers, employees and others. In addition, Defendant UNLV had a duty not to hire individuals with a propensity towards committing unlawful acts against the public, and to adequately train and supervise their employees.

66. Defendants, and each of them, breached their respective duties, and are therefore negligent and liable to the Plaintiff, who has suffered serious economic loss, loss of reputation, loss of daily and future income, and to incur severe financial obligations in order to retain attorneys, as well as other painful injuries, deprivation of his liberty, invasion of his privacy, grievous mental suffering, all to her damage in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

67. It has been necessary for the Plaintiff to obtain the services of an attorney to prosecute this action, and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

FIFTH CAUSE OF ACTION

INTENTIONAL AND NEGLIGENT INFLICTION OF SEVERE MENTAL DISTRESS

68. Paragraphs 1 through 67, inclusive, are incorporated by reference.

69. As a result of Defendants' intentional and negligent conduct and omissions, Plaintiff, suffered and continues to suffer great mental and emotional harm, anguish, insecurity, self-revulsion, damage to her self-esteem, and self-worth, shame and humiliation, including but not limited to: severe and clinical depression, anxiety, loss of sleep, and change of appetite.

70. Plaintiff has required medical and psychological care as result of the malfeasance and nonfeasance of Defendants. This has caused Plaintiff to incur expenses for medical care, treatment, and expenses incidental thereto. The total amount of Plaintiff's damages cannot yet be fully ascertained, and as such we respectfully ask leave of this Court to amend Plaintiff's Complaint to insert the full amount when such have been fully ascertained.

71. As a result of the mental distress described above, Plaintiff has suffered serious psychological injury, loss of community reputation, medical expenses, and to incur severe financial obligations in order to retain attorneys to seek redress against the unlawful conduct of the Defendants, as well as deprivation of his liberty, invasion of his privacy, and grievous mental suffering, all to damages in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

72. The acts, conduct and behavior of the Defendants were performed willfully, intentionally, oppressively, fraudulently and maliciously, by reason of which Plaintiff, is entitled to punitive damages in a sum in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

73. It has been necessary for Plaintiff to obtain the services of an attorney to prosecute this action, and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

SIXTH CAUSE OF ACTION

INJUNCTIVE DECLARATORY RELIEF

74. Paragraphs 1 through 73 inclusive are incorporated by reference.

75. Defendant actions of placing a hold on her academic transcript, and the placing of notations of any accusations, findings, or sanctions against her, in Plaintiff's student file or upon her transcript, is unjust and illegal.

76. The harm caused by Defendant is irreparable and can only be mitigated by the release of the above transcripts and omission of any notations. For that reason, Plaintiff is entitled to an order requiring Defendants to immediately release any holds on her transcript, remove any notations of any disciplinary accusations, findings or sanctions, and prohibiting Defendants from further interfering with Plaintiff's educational future.

77. As a result of the acts committed against Plaintiff, she has been damaged all in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

78. As a result of Defendants' intentional conduct, they have caused Plaintiff to incur attorney's fees in an amount in excess of SEVENTY-FIVE

THOUSAND DOLLARS ($75.000.00) and thus Plaintiff is entitled to an award of attorney's fees.

SEVENTH CAUSE OF ACTION

CIVIL CONSPIRACY

79. Paragraphs 1 through 78 inclusive are incorporated by reference.

80. At all times herein referred to, Defendants conspired with each other to fraudulently take action against Plaintiff to make false allegations about Plaintiff, to have her arrested and charged with a crime, and to have her punished for student conduct code violations, all while knowing that Plaintiff had not performed any of the acts in which they accused her of.

81. As a result of the mental distress described above, Plaintiff has suffered serious psychological injury, loss of community reputation, medical expenses, and to incur severe financial obligations in order to retain attorneys to seek redress against the unlawful conduct of the Defendants, as well as deprivation of her liberty, invasion of her privacy, and grievous mental suffering, all to damages in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

82. The acts, conduct and behavior of the Defendants were performed willfully, intentionally, oppressively, fraudulently and maliciously, by reason of which, Plaintiff is entitled to punitive damages in a sum in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

83. It has been necessary for Plaintiff to obtain the services of an attorney to prosecute this action and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

EIGHTH CAUSE OF ACTION

DEFAMATION, LIBEL AND SLANDER PER SE

84. Paragraphs 1 through 83 inclusive are incorporated by reference.

85. That Defendants' conduct described above severely harmed the reputation and character of the Plaintiff with the making of false statements to third parties, both orally and in writing.

86. That Plaintiff has suffered loss of reputation, shame, mortification and hurt feelings as a result of Defendants deliberate, malicious, intentional, and oppressive conduct.

87. As a direct and proximate result of the false statements made by Defendants, Plaintiff has suffered injury and damages all in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

88. The acts, conduct and behavior of each of the individual Defendants were performed knowingly, intentionally, oppressively, and maliciously, by reason of which, Plaintiff is entitled to punitive damages in a sum in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

89. It has been necessary for the Plaintiff to obtain the services of an attorney to prosecute this action, and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

NINTH CAUSE OF ACTION

MALICIOUS PROSECUTION/ABUSE OF PROCESS

90. Paragraphs 1 through 89 inclusive are incorporated by reference.

91. The Defendants' conduct, described above, resulted in the prosecution of Plaintiff by the actions of the Defendants, without probable cause, with malice, requiring Plaintiff to unnecessarily defend herself to have said criminal charges dismissed, thus violating her U.S. Constitutional Rights and State law.

92. The Defendants' conduct, described above, resulted in Defendants utilizing the UNLV Student Conduct Code process as a vehicle to maliciously take action against Plaintiff, to jeopardize Plaintiff's educational future and career, and force her to defend herself in said process, in violation of her U.S. Constitutional Rights and State law..

93. As a direct and proximate result of the above described conduct by Defendants, Plaintiff has suffered injury and damages all in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

94. The acts, conduct and behavior of each of the Individual Defendant's was performed knowingly,

intentionally, oppressively, and maliciously, by reason of which, Plaintiff is entitled to punitive damages in a sum in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

95. It has been necessary for the Plaintiff to obtain the services of an attorney to prosecute this action, and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

WHEREFORE, Plaintiff prays that this Honorable Court: Enter judgment in Plaintiff's favor, and against the Defendants, and each of them: (a) for compensatory damages in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00); (b) for punitive damages each in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00); (c) for injunctive and declaratory relief; and (d) together with the costs and disbursements of this action and such other attorney's fees pursuant to 42 U.S.C. § 1988, and further relief as justice requires.

DATED this 1st day of April, 2008.

THE BACH LAW FIRM, LLC

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APPENDIX B

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
* * * * *

CASE NO.: 2:08-cv-00417-JCM-GWF

[Filed July 11, 2008]

MEGAN KRAINSKI,

Plaintiff,

v.

THE STATE OF NEVADA. ex. Rel. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of the UNIVERSITY OF NEVADA, LAS VEGAS; a Political Subdivision of the State of Nevada; REBECCA MILLS, individually and as Vice President for Student Life of the University of Nevada, Las Vegas; RICHARD CLARK,

individually and as Director of Student Conduct and Residential Life of the University of Nevada, Las Vegas; PHILLIP BURNS, individually and as Senior Student Conduct Officer of the University of Nevada, Las Vegas; NANNETTE JIMENEZ, individually and as a Student Conduct Officer of the University of Nevada, Las Vegas; SUSAN M. CARRASCO, individually and as Assistant General Counsel of the University of Nevada, Las Vegas; TYREE PINI, individually and as Assistant Residential Life Coordinator; LESLIE WALLENFELDT, individually and as Residential Life Coordinator of the University of Nevada, Las Vegas; OFFICER BRETT GOFF, P#302, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER L. TRAMPOSCH, P#312, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER J. CULVER, P#309, individually and as a police officer with the University of Nevada, Las Vegas Police Department; KENYA POLEE, individually; DOES I-XX, inclusive,

Defendants.

OPPOSITION TO DEFENDANTS MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COMES NOW, Plaintiff, MEGAN KRAINSKI (hereinafter referred to as "Plaintiff"), by and through her attorney of record, JASON J. BACH, ESQ. of THE BACH LAW FIRM, LLC, and hereby opposes

Defendants' Motion to Dismiss Plaintiff's Complaint, pursuant to FRCP 12(b)(6). Plaintiff's opposition is based on the foregoing Points and Authorities, Plaintiff's Complaint, all papers and pleadings on file herein, and any oral argument requested from the Court.

DATED this 10th day of July, 2008.

THE BACH LAW FIRM, LLC

By: */s/ Jason J. Bach*
JASON J. BACH, ESQ.
Nevada Bar No.: 7984
6053 South Fort Apache Rd., Suite 130
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Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I.

LEGAL ARGUMENT

A. STANDARD OF REVIEW PURSUANT TO FRCP 12(b)(1) AND 12(b)(6).

The Court's review of a 12(b) motion is based strictly on the contents of the Complaint. The Court must accept the allegations as true and construe them in the light most favorable to the Plaintiff. ***Abramson***, 897 F.2d at 391; ***Love v. United States***, 871 F.2d 1488 (9th Cir. 1989). In such a case, the court may accept all of the alleged facts, and all inferences from the alleged facts, as true.

Pursuant to Federal Rules of Civil Procedure 12(b)(1), a Court must dismiss an action, "if as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations'." ***Neitzske v. Williams***, 490 U.S. 109 (1989) quoting ***Hishon v. King & Spaulding***, 467 U.S. 69, 73, 104 S.Ct. 2229 (1984); ***Abramson v. Brounstein***, 897 F.2d 389, 391 (9th Cir. 1990); ***Gibson v. United States***, 781 F.2d 1334 (9th Cir. 1986).

The Court's review of a 12(b)(6) motion is based on the contents of the Complaint. The Court must accept the allegations as true and construe them in the light most favorable to the Plaintiff. ***Abramson,*** 897 F.2d at 391; ***Love v. United States***, 871 F.2d 1488 (9th Cir. 1989).

From reviewing Plaintiff's Complaint, it is clear that allegations she sets forth arise to a level of various Constitutional violations, actionable under 42 U.S.C. § 1983 and Fourteenth Amendment to the United States Constitution. In describing the actions of Defendants', Plaintiff's Complaint reasonably infers that each government Defendant participated in the intentional denial of Plaintiff's right to due process. In addition, Plaintiff's Complaint establishes that money damages in excess of $75,000 were incurred as a result of Defendants' illegal conduct. For these reasons, Plaintiffs Complaint is viable and should not be dismissed.

B. ELEVENTH AMENDMENT IMMUNITY DOES NOT APPLY TO INDIVIDUAL DEFENDANTS OR THE ABILITY OF THIS COURT TO ENJOIN ALL DEFENDANTS.

State officials may be held personally liable for damages under § 1983 based upon actions taken in their official capacities. ***Hafer v. Melo***, 502 U.S. 21 (1991). It is incorrect for a district court to interpret ***Will v. Michigan Dept. of State Police***, 491 U.S. 58 (1989) to mean that § 1983 does not authorize suits against state officials for damages arising from official acts. ***Hafer*** at 23. State executive officials are not entitled to absolute immunity for their official actions. *Id.* at 29, *citing* ***Scheuer v. Rhodes***, 416 U.S. 232, 243 (1974). Even if state law requires the state to pay any damages awarded against a state official, a § 1983 action is not "against" the state for the purposes of the Eleventh Amendment immunity. ***Demery v. Kupperman***, 135 F.2d 1139 (9th Cir. 1984).

An action will *not* be deemed to be against the state, and thus barred by the Eleventh Amendment, where the plaintiff seeks to impose personal liability on state officials sued in their individual capacity as a result of actions undertaken by that official which violated plaintiff's federally protected rights. ***Bair v. Krug***, 853 F.2d 672 (9th Cir. 1988); ***Central Reserve Life of North America Ins. Co. v. Struve***, 852 F.2d 1158 (9th Cir. 1988).

Moreover, nearly 100 years ago the United States Supreme Court cleared the way for Plaintiff's, such as Mr. Lucey, to enforce their Constitutional Rights against state officials through injunctive relief. ***Ex parte Young***, 209 U.S. 123 (1908). The Court held

that injunctive relief may be obtained through the federal courts when state officials are accused of violating the Fourteenth Amendment:

> [T]he use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. . . . The officer. . . is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Id., at 159-160.

In other words, even if a state is immune from injunctive relief, the federal courts can put an end to unconstitutional conduct by state officials, by enjoining those state officials in their individual capacity. *Id.*

However, the case relied upon by State Defendants' in their Motion, ***Seminole Tribe of Florida v. Florida,*** 517 U.S. 44 (1996), does *not* bar injunctive relief by a federal court, in a § 1983 case, against the actual State or officials in their official capacity. The limitations imposed on the federal courts by ***Seminole Tribe***, *only* apply against a state where Congress had prescribed a "detailed remedial scheme for the enforcement against a State of a statutorily created right. . .." ***Ellis v. University of Kansas Medical Center***, 163 F.3d 1186 (10th Cir. 1998), *citing* ***Seminole Tribe***, 517 U.S. at 74. However, ***Seminole Tribe*** does not limit the federal courts ability to enforce constitutional rights, such as Ms. Krainski's due process rights. *See*, ***Ellis***, 163 F.3d 1186. Additionally, § 1983 did not create a detailed remedial

scheme, or any substantive rights at all, but is simply a vehicle for bringing constitutional claims before the federal courts. *Id.* As such, UNLV is subject to the injunction powers of this court, as Plaintiff's claims are constitutional in nature, not statutory.

Plaintiff has the right to bring causes of action for money damages against the individual Defendants. ***Hafer v. Melo***. This court has every ability to enjoin *all* Defendants from continuing to violate Plaintiff's constitutional rights. It may be accomplished by an order to the State university, or by an order to the individual defendants in their individual capacity, pursuant to ***Ex parte Young***.

1. **THE ELEVENTH AMENDMENT DOES NOT BAR A FEDERAL SUIT AGAINST OFFICIAL CAPACITY DEFENDANTS, AS CONSTITUTIONAL VIOLATIONS ARE ON-GOING.**

The Ninth Circuit has held that the Eleventh Amendment does not bar federal suits against Nevada officials, in their official capacity, where the relief sought is prospective in nature and is based on an on-going violation of the plaintiff's *federal* constitutional or statutory rights. ***Central Reserve Life of North America Ins. Co. v. Struve***, 852 F.2d 1158 (9th Cir. 1988), *citing* ***Ex Parte Young***; ***Charley's Taxi Radio Dispatch Corp. v. Sida of Hawaii, Inc.***, 810 F.2d 869, 874 (9th Cir. 1987). That is certainly the case here. As alleged in Plaintiff's Complaint, Defendants' have made notations upon her transcripts of the unlawful disciplinary actions taken against Plaintiff. As such, Defendants continue to violate Plaintiff's Fourteenth Amendment Rights,

which gives this Court jurisdiction over Defendants in their *official* capacity, and Defendants are not entitled to Eleventh Amendment immunity in their official capacity. ***Central Reserve Life of North America Ins. Co. v. Struve***.

C. INDIVIDUAL DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY AS THEY VIOLATED PLAINTIFF'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS.

A defendant is entitled to qualified immunity if the defendant did not violate "clearly established rights" at the time of the conduct in question. See, ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982). Defendants accurately point to the two-prong test established in ***Saucier v. Katz***, 533 U.S. 194 (2001).

The test for qualified immunity is objective. The defendant's actual purpose or state of mind is not material. Whether rights were "clearly established" at the relevant time is determined in most instances by looking at controlling published court decisions as of that time. See, ***United States v. Lanier***, 520 U.S.259, 269-71 (1997) (discussing qualified immunity in § 1983 and ***Bivens*** cases).

While the law in this matter is clearly established in favor of Plaintiffs, it is not necessary for a plaintiff to show a published decision establishing the rights in question under precisely the same circumstances as those presented in the case in question. Some conduct so clearly violates a person's rights that the question is unlikely to come before the courts for a decision. The Supreme Court has explained in the context of both fair warning for criminal law and qualified immunity

for civil rights defendants, that "general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" ***United States v. Lanier***, 520 U.S. at 271, *quoting* ***Anderson v. Creighton***, 483 U.S. 635, 640 (1987). To rule that until the Supreme Court has spoken, no right of litigants in this circuit can be deemed established before we have decided the issue would discourage anyone from being the first to bring a damages suit in this court; he would be certain to be unable to obtain any damages. ***Burgess v. Lowery***, 201 F.3d 942, 85 A.L.R.5th 719 (7th Cir. 2000) (affirming denial of summary judgment based on qualified immunity).

In ***Capeoman v. Reed***, 754 F.2d 1512, 1514 (9th Cir.1985), the 9th Circuit interpreted the meaning of ***Harlow's*** "clearly established" rights standard. They concluded that in the absence of binding precedent, a court should look at all available decisional law including decisions of state courts, other circuits, and district courts to determine whether the right was clearly established. ***Ward v. County of San Diego***, 791 F.3d 1329, 1332 (9th Cir. 1986), *citing* ***Capeoman***. An additional factor is the likelihood that the Supreme Court or the Ninth Circuit would have reached the same result as courts that had already considered the issue. *Id.*, *citing* ***Capeoman*** at 1515.

Similarly, in ***Buonocore v. Harris***, the Fourth Circuit held that the Fourth Amendment prohibits government agents executing a valid search warrant from aiding a private individual carry out an

independent search of a home for items unrelated to those specified in the warrant. Affirming a denial of summary judgment based on qualified immunity, the court found that no opinion directly on point was needed to show that the alleged conduct violated clearly established rights. 65 F.3d 347, 356-57 (4th Cir.1995). The Fourth Circuit quoted another Seventh Circuit case on this issue: "the absence of [many] reported case[s] with similar facts demonstrates nothing more than wide-spread compliance with well-recognized constitutional principles." *Id.* at 357, quoting ***Eberhardt v. O'Malley***, 17 F.3d 1023, 1028 (7th Cir.1994).

The absence of such cases, however, does not mean a government employee is entitled to immunity for such conduct. "There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune ... because no previous case had found liability in those circumstances." ***K.H. ex rel. Murphy v. Morgan,*** 914 F.2d 846, 851 (7th Cir.1990). The controlling question is whether a reasonable government official would have understood at the time of the conduct in question that the conduct violated the Plaintiffs' constitutional rights.

In this matter, however, the United States Supreme Court has clearly established the law, by way of their decision in ***Goss v. Lopez***, 419 U.S. 574 (1975).

> [A] student's legitimate entitlement to a public education [is] a property interest which protected by the Due Process Clause and which may not be taken away for misconduct without

adherence to the minimum procedures required by that Clause. *Id.*

Numerous other cases have also expressed the due process rights of public university students. ***Dixon v. Alabama State Board of Education***, 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961); ***Marin v. University of Puerto Rico***, 377 F. Supp. 613 (D.P.R. 1974); ***Crook v. Baker***, 584 F. Supp. 1531, 1556 (E.D. Mich. 1984); ***Gabrilowitz v. Newman***, 582 F.2d 100 (1st Cir. 1978).

The Fourteenth Amendment protection that is owed to Plaintiff has been clearly established as far back as ***Dixon v. Alabama State Board of Education*** 1961, or at least since ***Goss v. Lopez*** in 1975. The Defendant government officials in this case knew that Plaintiff was entitled to due process, and knew what "due process" was, but deliberately violated Plaintiff's constitutional rights by taking discipline action against her without adequate notice or a hearing. As a result, Defendants violated Plaintiff's "clearly established rights" and are not entitled to qualified immunity. ***Harlow; Saucier***.

D. PLAINTIFF HAS ADEQUATELY STATED A CLAIM FOR HER CAUSE OF ACTION PURSUANT TO 42 U.S.C. §1983.

1. PLAINTIFF HAS COMPLIED WITH FRCP 8(a).

FRCP 8(a) states, in relevant part: "A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim,

shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . ."

Plaintiff's Complaint provides detailed explanations of the allegations being made against Defendant UNLV, as well as the individual Defendants'. The due process allegations, bought pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment, detail the lack of notice, procedural defects, and lack of legitimate state interest which constitute a lack of due process. Plaintiff's Complaint also details the false arrest and unlawful seizure committed by Defendants.

Moreover, Defendants' have been provided ample notice of Plaintiff's state law allegations. Each of Plaintiff's causes of action incorporates the general factual allegations in paragraphs 23-38 of Plaintiff's Complaint.

2. PLAINTIFF HAS PROPERLY ALLEGED A DE FACTO POLICY.

This is a case where Defendants' have policies and procedures in place to adequately provide students, such as Plaintiff, procedural and substantive due process, but chose to ignore those policies and procedures and enact their own "de facto policy."

The term "policy" "generally implies a course of action consciously chosen from among various alternatives." ***City of Oklahoma v. Tuttle***, 471 U.S. 808, 823, 105 S.Ct. 2427, 2436, 85 L.Ed.2d 791 (1985). ***Monell v. Department of Social Services***, 436 U.S. 658 (1978), imposes liability for injuries resulting from such a choice, if a Constitutional deprivation was "visited pursuant to governmental 'custom' even

though such a custom has not received formal approval through the body's official decision-making channels." ***Monell***, 436 U.S. at 690-91, 98 S.Ct. at 2035-36. This is also referred to as a "de facto policy."

As explained in ***Oklahoma City v. Tuttle***, once a de facto policy is established, "it requires only one application ... to satisfy fully ***Monell's*** requirement that the government be held liable only for constitutional violations resulting from the government's official policy." *Id.*, at 822.

"[I]f ... officials know or should know of the particular vulnerability, then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability." ***Redmen v. County of San Diego***, 942 F.2d 1435 (9th Cir. 1991); *quoting*, ***Colburn v. Upper Darby Township***, 838 F.2d 663, 669 (3rd Cir.1988), cert. denied, 489 U.S. 1065, 109 S.Ct. 1338, 103 L.Ed.2d 808 (1989).

"A person deprives another 'of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that *causes* the deprivation of which [the plaintiff complains]." ***Leer v. Murphy***, 844 F.2d 628, 633 (9th Cir.1988); *quoting* ***Johnson v. Duffy***, 588 F.2d 740, 743 (9th Cir.1978).

Plaintiff needs not show that individual Defendants and UNLV maintained a policy affirmatively *encouraging* officials, or each other, to violate the Constitutional rights of its students; " . . . . governments may be liable under Section 1983 for

constitutional injuries inflicted by their employees if their *failure* adequately to guard against such injuries through training and supervision rises to the level of 'deliberate indifference' to the constitutional rights of citizens who come in contact with those employees. ***Doe By and Through Knackert v. Estes***, 926 F.Supp. 979, 987 (D.Nev. 1996); *citing*, ***City of Canton*** at 388.

Plaintiff's Complaint adequately alleges that Defendants' actions were taken pursuant to such a "de facto policy." As such, Plaintiff's cause of action is sufficiently plead.

3. PLAINTIFF HAS PROPERLY ALLEGED THAT DEFENDANTS HAVE VIOLATED HER CONSTITUTIONAL RIGHT TO DUE PROCESS.

The United States Supreme Court has established that students have a property interest in their education. ***Goss v. Lopez***, 419 U.S. 574 (1975).

> [A] student's legitimate entitlement to a public education [is] a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause. *Id.*

The first case to recognize a university student's right to due process in a disciplinary hearing was ***Dixon v. Alabama State Board of Education***, 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961). In this case from the civil rights era, Alabama State College expelled nine black students, without

notice and without the benefit of a hearing, (*Id.*, 158) after the students conducted a sit-in demonstration at a public courthouse lunch grill that refused service to blacks. *Id.*, 152, n.3. The Fifth Circuit Court of Appeals held that due process required notice and a hearing before a student at a tax-supported college can be expelled for misconduct. *Id.*, 158.

Furthermore, the Court made clear that a state institution may not circumvent the fundamental right to due process by conditioning a grant of admission upon students' agreeing to give up their constitutional right to due process. *Id.*, 156, citing ***Slochower v. Board of Educ.***, 350 U.S. 551, 555 (1956). The school must establish some reasonable grounds for its disciplinary actions and must do so procedurally through "fundamental principles of fairness." *Id.*, 157. The court would test fairness by examining the sufficiency of the hearing and the preceding notice. *Id.*, 158-159.

The ***Dixon*** court broadly defined the notice and hearing required in cases of student expulsion:

> [A]n opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. *Id.*, 159.

More than a decade later, the federal District Court for the District of Puerto Rico took due process a step further. In ***Marin v. University of Puerto Rico***, 377 F. Supp. 613 (D.P.R. 1974) the court held that students are entitled to:

(1) adequate advance notice of

(a) the charges,
(b) the specific, previously promulgated regulations under which the charges are brought, and
(c) the evidence against the student;

(2) a full, expedited evidentiary hearing

(a) presided over by an impartial, previously uninvolved official,
(b) the proceedings of which are transcribed, at which the student
(c) can present evidence and
(d) cross-examine opposing witnesses,
(e) with the assistance of retained counsel;

(3) a written decision by the presiding official encompassing

(a) findings of fact,
(b) the substantial evidence on which the findings rest, and
(c) the reasons for the official's conclusion. *Id.*, 623.

The ***Marin*** court held that these due process protections must be guarded most scrupulously when the university's action may damage the student's standing in the community, or may impose a stigma or "mark on one's record that may well preclude further study at any public and many private institutions and limit the positions one can qualify for after termination of one's studies." *Id.*, 622, *citing* ***Roth***, 408

U.S. 573. To date, ***Marin*** marks the outer limit of rights recognized for students.

Until the United States Supreme Court's ***Goss v. Lopez***, 419 U.S. 565 (1975) decision in 1975, jurisdictions remained split as to whether students were entitled to any due process by public educational institutions. In ***Goss***, the Court set aside the summary 10-day suspensions of nine high school students charged with various acts of disruptive conduct during school hours. *Id.* "At the very minimum," the Court held, due process required notice and an informal hearing prior to the students' suspension. *Id.*, 579 "[D]ue process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* Had the suspension exceeded 10 days the Court might have required "more formal procedures." *Id.*, 584. The Court concluded that the adequacy of the notice and the nature of the hearing sufficient to satisfy due process would vary according to an "appropriate accommodation of the competing interests involved." *Id.*, 579.

A landmark decision, ***Goss*** opened the gates for cases brought by students at all educational levels. In one example of ***Goss's*** application, ***Crook v. Baker*** 584 F. Supp. 1531, 1556 (E.D. Mich. 1984) the federal District Court for the Eastern District of Michigan held that a university student was entitled to notice and a hearing before the University of Michigan could rescind a graduate's master's degree on the grounds that he had fabricated data underlying his thesis. *Id.*

After ***Goss***, schools could no longer deny students their procedural due process, and expect to get away with it.

a. Plaintiff Has Alleged That She Was Not Provided with Notice, Thus Violating Her Fourteenth Amendment Rights.

The ***Goss*** Court determined that high school students facing the deprivation of a property right by suspension from school must, at a minimum. "be given *some* kind of notice and afforded *some* kind hearing." 419 U.S. 579 (emphasis in original). In an earlier decision, the Supreme Court had established that "[a]n elementary and fundamental requirement of due process ... is notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." ***Mullane v. Central Hanover Trust Co.***, 339 U.S. 306, 314 (1950); *see also* ***Memphis Light, Gas & Water Div. v. Craft***, 436 U.S. 1, 13 (1978). Applying that standard in ***Goldberg v. Kelly,*** 397 U.S. 254, 268 (1970) (fairness in some cases may require more than seven days' notice of the termination of welfare benefits) the Supreme Court held that a few days notice is inadequate for the termination of welfare benefits. Lower courts have specifically held that notice of five days or less for an employment termination hearing is insufficient notice. ***Walker v. U.S.***, 744 F.2d 67, 70 (10th Cir.1984) (five days' notice to a public employee insufficient pre-termination notice); ***Wagner v. Little Rock School District***, 373 F.Supp. 876 (E.D.Ark. 1974) (one day inadequate to notify a school teacher of her termination hearing).

In a case involving a private college, the United States District Court for the District of Vermont reversed Middlebury College's one year suspension of a student, holding that the school deviated from its published notice policy by informing the accused student of only one of the two charges that had been brought against him. ***Fellheimer***, 869 F. Supp. at 246-47. The court held that the college must "state the nature of the charges with sufficient particularity to permit the accused party to meet the charges," as expressed in the school's policy. *Id.*

What constitutes adequate notice may be difficult to measure, but colleges and universities are clearly at an advantage over a student who may have limited or no resources with which to prepare for a hearing. The guiding principle should be that students have ample time to secure and obtain the advice of counsel, review and investigate the claims against them, and prepare a defense to the accusations made against them. Considering the limited resources of students, a notice of fewer than ten working days likely does not allow an accused student time to adequately defend himself.

Plaintiff has alleged, that despite the UNLV Student Conduct Code in place, "Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO failed to provide Plaintiff with proper notice of the formal hearing, violating her U.S. Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code." *Plaintiff's Complaint*, paragraph 33. Plaintiff's allegation of improper notice is sufficient to put Defendants on notice pursuant to FRCP 8(a).

b. Plaintiff Has Alleged That She Was Disciplined, Despite Defendants Knowledge That She Was Innocent, Thus Violating Her Fourteenth Amendment Rights.

In addition to the procedural protections outlined above, the Due Process Clause of the Fourteenth Amendment provides a guarantee against arbitrary decisions that would impair appellants' constitutionally protected interests. ***Dixon***, 294 F.2d at 157. This guarantee of "substantive due process" protects certain fundamental "substantive" rights we all share. The Supreme Court has said of substantive due process that, "the Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." ***Washington v. Glucksberg***, 521 U.S. 702, 719 (1997). It provides "heightened protection against government interference with certain fundamental rights and liberty interests." ***Id.*** at 720. As the court stated in ***Dixon***, "the governmental power to expel the plaintiffs ... is not unlimited and cannot be arbitrarily exercised. Admittedly, there must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement." ***Dixon***, 294 F.2d at 157. Under principles of substantive due process, students cannot be disciplined for constitutionally protected actions, or for actions which the government has no legitimate interest in punishing.

In addition to protecting such fundamental rights as free speech, substantive due process assures that any government action bear, at a minimum, a rational relationship to a legitimate governmental interest. In

Alabama & Coushatta Tribes v. Big Sandy School District, 817 F.Supp. 1319 (E.D. Tex. 1993), the federal District Court for the Eastern District of Texas provided two theories upon which a successful substantive due process claim may be made. "If the suspensions were patently unreasonable or disproportionate to the offense, the [students] would be entitled to relief," or, if there was a "substantial departure from academic norms," the student would also be entitled to relief. ***Id***. at 1335.

Plaintiff's Complaint explicitly states that Defendants retaliated against her for her actions against a star athlete and found her responsible for various actions despite no evidence ever being presented.

> 35. Despite the fact that no evidence was ever presented to support any of the allegations made against Plaintiff, Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO found Plaintiff to be "Responsible" of said charges, completely ignoring the evidence that exonerated Plaintiff, forever tarnishing the educational transcript and record of Plaintiff, as well as causing severe psychological and physical injuries, all in violation of her U.S. Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code.
>
> 36. Plaintiff filed a timely appeal of Defendants decision. However, Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO again ignored the facts and dismissed the appeal, all in violation of her U.S.

> Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code.
>
> 37. Defendants have taken said actions against Plaintiff in retaliation for her making a complaint against a star athlete, and further retaliating against her for asserting her rights pursuant to the U.S. Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSME) Code.

These acts by the Defendants were taken without a legitimate state interest and thus violate the Plaintiff's substantive due process rights.

c. Plaintiff Has Alleged That Defendants' Ignored Their Own Due Process Safeguards, Thus Violating Her Fourteenth Amendment Rights.

It is not enough for a school to go through the motions of enacting a student conduct code. For any such code to have credibility, the institution must abide by it. In ***Lightsey v. King***, 567 F.Supp. 645 (E.D.N.Y. 1983) a student was given a grade of "zero" for cheating, even after the institution's Honor Board found him "not guilty" of the allegations. The court held that "there was no difference between failing to provide a due process hearing and providing one but ignoring the outcome. By holding the Honor Board hearing and then disregarding its result, the Academy violated ***Lightsey's*** right to due process." *Id.* At 649.

Courts review the disciplinary decisions of schools to ensure that they are not arbitrary and capricious,

and that the process is conducted with basic fairness. ***Coveney v. Pres. of Coll. of the Holy Cross***, 445 N.E.2d 136, 138 (Mass. 1983); ***Ahlum v. Administrators of the Tulane Educ. Fund***, 617 So. 2d 96, 98-99 (La. Ct. App. 1993); ***Psi Upsilon of Phila. v. University of Pa.***, 591 A.2d 755, 760 (Pa. Super. Ct. 1991); ***Anderson***, 1995 WL 813188, at * 4-*5; ***Cloud v. Trustees of Boston Univ.***, 720 F.2d 721, 725 (1st Cir. 1983).

In ***Anderson v. Mass. Inst. Of Tech.***, the Massachusetts Superior Court went so far as to adopt a rule that the court may intervene in the student-school relationship when the student demonstrates that the school's action was arbitrary and capricious, when the school failed to follow its own disciplinary rules, or when the school did not afford the student with a hearing that was fundamentally fair. ***Anderson***, 1995 WL 813188, at * 4. "Such hearings at the very least should provide the student with written notice of the charges against him or her; a written description of the evidence upon which the charges are based; the names of the witnesses which the university intends to call at the hearing; an unbiased disciplinary committee or tribunal; an opportunity to be heard and present witnesses in his behalf; and the right to confront and controvert the evidence presented by the university." *Id.*

It is fundamentally unfair when a large public university, such as Defendant', publishes a Student Conduct Code, distributes that code to the all of its students, publishes that code on its web site, holds its students accountable for abiding by that code, but then the university chooses to repeatedly ignore its own rules of due process as prescribed by the code.

Plaintiff's Complaint specifically alleges that Defendants' had these policies and procedures in place, via their Student Conduct Code and Nevada System of Higher Education (NSHE) Code, but those to ignore them. *Plaintiff's Complaint*, paragraphs 34.

4. PLAINTIFF HAS PROPERLY ALLEGED A VIOLATION OF HER FOURTH AND FOURTEENTH AMENDMENT RIGHTS TO UNLAWFUL ARREST AND SEIZURE.

Police officers have the power to arrest citizens without a warrant if they have probable cause. See ***Atwater v City of Lago Vista***, 532 US 318, 322 (2001). A citizen who is arrested without probable cause can bring a civil action against the officer under 42 USC § 1983 for false arrest. A false arrest is a violation of the Fourth Amendment right against unreasonable seizure of persons. ***Hand v Gary***, 838 F2d 1420, 1427 (5th Cir 1988) ("The Fourth and Fourteenth Amendments guard against arrest without probable cause.").

Under § 1983, citizens may seek redress for violations of their constitutional rights by state or local officials The statute guarantees that "[e]very person who, under color of any statute, ordinance, regulations, custom or usage, or any State or Territory...subjects ...any...person...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. 42 USC § 1983 (2000). A § 1983 action has two essential elements: that the alleged injury was committed by a person acting under color of state law, and that this conduct deprived the person of a right "secured by the Constitution and the laws" of the United States. ***Flagg***

Brothers, Inc. v Brooks, 436 US 149, 155-56 (1978) (holding that a private business's action as permitted under New York Uniform Commercial Code was not "under color or state law" as required for a § 1983 claim). The primary purpose of § 1983 are "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." ***Wyatt v Cole***, 504 US 158, 161 (1992), *citing* ***Carey v Piphus***, 435 US 247, 254-57 (1978). Thus, this broad remedy protects citizens against the violation of any federal right by state officials.

Unconstitutional false arrest is a cognizable claim under § 1983, and is in fact one of the most common § 1983 claims brought against police officers (From 1989-1993, excessive force issues were the most common in § 1983 claims against police at 24 percent, and false arrest claims were the second most common at 22 percent. Forty percent of cases against the police involved both excessive force and false arrest. Scarborough and Hemmens, 21 T Jefferson L Rev at 11). An illegal arrest is an unreasonable seizure under the Fourth Amendment (*See* ***Hand v Gary***, 838 F2d 1420, 1427 (5th Cir 1988), quoting ***Thomas v Sams***, 734 F2d 185, 191 (5th Cir 1984) ("The right to be free from illegal arrest plainly enjoys [constitutional] protection."); ***Patzig v O'Neil***, 577 F2d 841, 848 (3d Cir 1978) ("Clearly, an arrest without probable cause is a constitutional violation actionable under § 1983.")), which protects "*persons*, houses, papers, and effects against unreasonable searches and seizures" (US Const Amend IV (emphasis added)). This guarantee applies to the states through the Due Process Clause of the Fourteenth Amendment. See ***Monroe v Pape***, 365 US 167, 171 (1961).

Actions for unconstitutional false arrest generally parallel the common law action of false arrest or false imprisonment. *See* ***City of Newport v Fact Concerts, Inc.***, 453 US 247, 258 (1981) ("One important assumption underlying the Court's decision in this area [tort liability under § 1983] is that members of the 42d Congress were familiar with common law principles...and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.") At common law, the elements of a false arrest claim were (1) the detention of the plaintiff, and (2) the unlawfulness of the detention. *See* ***Winn & Lovett Grocery Co. v Archer***, 126 Fla 308, 171 S 214, 218 (1936) ("[T]o recover for false arrest of the person, it must be shown that the restraint was unreasonable and such as was not warranted by the circumstances."). *See also* ***Vorholt v Vorholt***, 111 W Va 196, 160 SE 916, 917-18 (1931) ("The gist of an action for false imprisonment is the illegal detention of a person without lawful process or by an unlawful execution of such process."); ***Garrity v Fleming***, 121 Kan 42, 245 P 1054, 1055 (1926) ("False arrest or imprisonment is any unlawful physical restraint by one of another's liberty, whether in prison or elsewhere.").

Police officers may make arrests without a warrant, but the lawfulness of that arrest turns on whether there was probable cause. ***United States v Watson***, 423 US 411, 417 (1976). For the purposes of a false arrest claim, probable cause exists where the officer had "reasonably trustworthy information" of facts and circumstances that would lead a "prudent man" to believe that an offense had been committed. ***Karr v Smith***, 774 F2d 1029, 1031 (10th Cir 1985) (discussing when an officer has probable cause to make an arrest,

including the "fellow officer" rule that allows probable cause to be determined according to the collective information possessed by all officers involved). Probable cause has been described by the Supreme Court as a "practical, nontechnical" requirement that balances the competing interests of effective law enforcement and the protection of citizens' rights. ***Brinegar v United States***, 338 US 160, 176 (1949). In practical terms, a court determines whether there was probable cause by examining the circumstances of the arrest and deciding whether the "historical facts" available at the time of the arrest, "viewed from the standpoint of an objectively reasonable police officer, amount to...probable cause." ***Ornelas v United States***, 517 US 690, 696 (1996) (stating that probable cause is not a "finely-tuned standard" but instead is a fluid concept that depends on the particular circumstances of a situation.).

For the purposes of a § 1983 action, probable cause does not depend upon what the magistrate found at the preliminary hearing or arraignment. ***Whitley v Seibel***, 613 F2d 682, 685 (7th Cir 1980) (explaining that a court will assess the presence of probable cause in a § 1983 false arrest action using a "reasonable man standard" regardless of the magistrate's ruling). If a magistrate determines that no probable cause existed to hold the suspect for the crime, that does not automatically make the officer liable in a § 1983 action. The question is whether a reasonable office would have believed there was probable cause at the time of the arrest, regardless of what the magistrate eventually found at the probable cause hearing, or what the grand jury found at the arraignment. ***Id.***

The Ninth Circuit places the burden of proof for probable cause on the defendant. ***Dubner v City and County of San Francisco***, 266 F3d, 959, 965 (9th Cir 2001) (explaining that the arresting officer has the burden of showing probable cause once the plaintiff makes a prima facie case of unlawful arrest.). The initial burden is on the plaintiff to establish an invasion of his rights, that is, an illegal arrest, and the plaintiff can make a prima facie case, "simply by showing that the arrest was conducted without a valid warrant." ***Dubner***, 266 F3d at 965. Once the plaintiff makes a prima facie case, the burden shifts to the defendant to produce evidence of probable cause. ***Id***. An arrest made without a warrant is presumptively unlawful if the defendant "is unable to or refuses to come forward with any evidence that the arresting officers had probable cause." ***Id***.

Thus, the defendant bears the burden of production, and must introduce enough evidence on the issue of probable cause so that the issue can be decided by the factfinder rather than on summary judgment.

The Ninth Circuit advances a policy rationale-that the defendant officers should bear the burden of production because they have the best access to the evidence that would tend to prove or disprove probable cause. ***Dubner***, 266 F3d at 965 ("This minimal burden shifting forces the police department, which is the better position to gather information about the arrest, to come forward with some evidence of probable cause."). Thus, the Ninth Circuit places the burden of production on the defendant officers because they, not the plaintiffs, have the best access to the information

and can most cost-effectively produce this evidence at trial. ***Id.***

Plaintiff was arrested by Defendants on a charge of felony assault with a deadly weapon. Defendants wrongly assert that Plaintiff was not exonerated of the charges against her. The minutes of the Las Vegas Justice Court, which were attached as *Exhibit 1* to their Motion, clearly show that Plaintiff was never adjudicated "guilty" of any crime, and that the charges against her were "dismissed." No judge ever made any finding that the Defendant Officers had any probable cause at the time of Plaintiff's arrest. To the contrary, the charge was later amended to a misdemeanor disorderly conduct, and then dismissed. It is impossible for Defendants to meet their burden pursuant to ***Dubner*** on a motion to dismiss. Plaintiffs Complaint is properly plead, and must proceed to trial. *See* ***Id.***

E. PLAINTIFF'S STATE CLAIMS EACH SUFFICIENTLY ALLEGE A PROPER CAUSE OF ACTION.

1. BEACH OF CONTRACT.

Courts have held that schools may not deviate from the express due process protections established in their student conduct codes, whether they are public or private, as such deviations would violate the implied contractual interests of the student. ***Tedeschi v. Wagner College***, 404 N.E. 2d 1302 (N.Y. 1980).

To understand whether a contract exists between a student and an institution, one must examine the elements of a contract. A contract requires that there

be a bargain which includes both a manifestation of mutual assent to the exchange and "consideration." *Restatement (Second) of Contracts* §17(1). In contract law parlance, consideration is the returned promise or performance bargained for. *Id.* For example, a student pays tuition in consideration for an education. An institution provides education in consideration for tuition.

The terms of a contract need not be fully expressed and contained within a formal document, but may be implied by law or from the parties' conduct or other evidence of mutual assent. *3A.* ***Corbin Contracts*** § 541 AT 97 (1960); See also ***Wagenseller v. Scottsdale Memorial Hospital***, 710 P.2d 1025, 1036 (Ariz. 1985) (opinion superseded by statute). There are two types of implied contracts, implied-in-fact and implied-in-law. ***Wagenseller***, 710 P.2d at 1036. An implied-in-fact contract is one that is inferred from the statements or conduct of the parties. *Id.* "It is not a promise defined by the law, but one made by the parties, though not expressly." *Id.* Student conduct codes, for example, are implied-in-fact contracts. In contrast, an implied-in-law duty arises when the contract is silent, but the law requires that a duty be imposed even though the parties may not have intended it. *Id.*, citing 1 A. ***Corbin***, supra note 21, §17, at 38.

A contractual relationship begins when the institution accepts the student's application for admission. ***Curtis J. Berger & Vivian Berger, Academic Discipline: a Guide to Fair Process for the University Student***, 99 Colum. L. Rev. 289, 318-19 (1999). The effect of the acceptance is to make an irrevocable offer to the successful applicant, usually

for a limited period time, for a seat in the entering class. By making a deposit before the offer expires, the applicant extends the offer until the beginning of the school year. Before classes start, the applicant will arrive on campus and register, thereby becoming an enrolled student. If the student is a degree candidate, he or she expects to be offered a curriculum which, if completed satisfactorily, will lead to the degree. The student further expects that the school will treat him or her fairly, including not being subjected to arbitrary grading or dismissal, extreme tuition hikes, or a sizable escalation of the degree requirements. These expectations are implied-in-law terms of the contract the student enters into with the institution. Though not explicitly spelled out, they are essential to the student's ability to benefit from the bargain he entered into with the institution, and are thus implied (by law) as part of the contract. Payment of a student's tuition constitutes consideration for these expectations. *Id.*

In return, the school expects payment of tuition and fees and compliance by the student with a set of rules, both academic and non-academic, as a member of the university community. The school's expectations, like those of the student, are implied-in-law terms of the contract. These mutual understandings and expectations form the essence of a contractual relationship. *Id.*

An additional, and essential, part of the student-university relationship is the implied-in-fact contract created by a written student conduct code. Usually issued annually, the student conduct code is one of the primary documents used by the school to describe to students the academic and non-academic requirements and limitations placed upon them. The

student conduct code puts students on notice that their continued enrollment is subject to their obedience of the school's rules, and also informs them of the procedures to be followed in the event of any alleged disobedience. The written code provides the terms and conditions to be followed by both the school and the student, thus creating an implied-in-fact contract between the school and the student.

In ***Tedeschi v. Wagner College,*** 404 N.E. 2d 1302 (N.Y. 1980) a private college suspended a part-time student because of her alleged disruptive and abusive conduct during and outside class. The student filed suit seeking monetary damages and reinstatement in the college. *Id.*, 1304. She alleged that the school had not given her a hearing or any opportunity to defend herself. *Id.* The New York state trial court entered judgment for the defendant, holding that the United States Constitution did not apply because the private college was not "state involved" and because the school's informal procedure was carried out in good faith and was not arbitrary. *Id.* After a split Appellate Division affirmed, the New York Court of Appeals reversed, ordering that the student be conditionally reinstated. *Id.*, 1307.

The court pointed to a college brochure, "***1976-1977 Guidelines of Wagner College,***" which outlined Wagner's procedure for adjudicating academic and non-academic suspension or dismissal. *Id.*, 1304. The college had failed to convene the Student-Faculty Hearing Board, which the guidelines required, prior to suspending the student. *Id.*, 1306. On appeal, she argued that the student-private college relationship is contractual and that an implied term of the contract is that the school will observe its own rules. *Id.*, 1305.

In short, New York's highest court held:

> Whether by analogy to the law of associations, on the basis of a supposed contract between university and student, or simply as a matter of essential fairness in the somewhat *one-sided* relationship between the institution and the individual, we hold that when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed. *Id.*, 1306. (emphasis added).

Since ***Tedeschi***, a number of other courts have required private schools to act in accordance with their published policies. ***Fellheimer v. Middlebury Coll.***, 869 F. Supp. 238, 244 (D. Vt. 1994) (college breached its contractual duty when it failed to put student on notice of all charges against him); ***Holert v. Univ. of Chi.***, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) (student is entitled to the procedural safeguards that the school agreed to provide); ***Schaer v. Brandeis Univ.***, 735 N.E.2d 373, 381 (Mass. 2000) (a university should follow its established rules); ***Anderson v. Mass. Inst. of Tech.***, 1995 WL 813188, *1, *4 (Mass. Super. 1995) (courts may intervene when school's action was arbitrary and capricious). For example, in ***Fellheimer v. Middlebury College***, the United States District Court for the District of Vermont held that Middlebury College was contractually bound to provide students with the procedural safeguards and rights it promised in its publications. 869 F. Supp. at 241. To deviate from those published procedures would make the hearing fundamentally unfair. *Id.*, 246.

In addition, a university's suspension or other punishment of a student without good cause, violates the covenant of good faith and fair dealing, which is an implied-in-law term of the contract. *See* 3 ***A. CORBIN***, *supra* note 17, § 541 at 97. *See also* 5 S. WILLISTON, THE LAW OF CONTRACTS § 670 at 159 (3d ed. 1961); ***Wagenseller***, 710 P.2d at 1038, ***citing Restatement (Second) of Contracts*** § 205; ***Savoca Masonry Co. v. Homes & Son Construction Co.***, 542 P.2d 817, 821 (Ariz. 1975). The covenant of good faith and fair dealing requires that neither contracting party do anything that will injure the right of the other to receive the benefits of their agreement, *See* ***Wagenseller***, 710 P.2d at 1038, ***citing Comunale v. Traders & General Insurance Co.***, 328 P.2d 198, 200 (Cal. 1958); ***Fortune v. National Cash Register Co.***, 364 N.E.2d 1251, 1257 (Mass. 1977) in this case the right of the student to receive an education, and the right of the university to educate others. It imposes on the school a good faith duty, at a minimum, to substantially adhere to its published disciplinary procedures. In certain circumstances, breach of contract, including breach of the covenant of good faith and fair dealing, may provide the basis for a tort claim. *See Id.* at 1038-39, *citing* ***Noble v. National American Life Insurance Co.***, 624 P.2d 866, 868 (Ariz. 1981); ***Seamen's Direct Buying Service v. Standard Oil Co. of California***, 686 P.2d 1158 (Cal. 1984); ***Wallis v. Superior Court***, 207 Cal.Rptr. 123 (1984); ***Gates v. Life of Montana Insurance Co.***, 638 P.2d 1063 (Mont. 1982).

In ***Napolitano v. Trustees of Princeton University***, 453 A.2d 279 (N.J. Super. Ct. Ch. Div. 1982), a New Jersey state court held that a university disciplinary hearing, which resulted in the withholding

of the student's degree for one year, failed to comply with the university's own rules when the student was not timely informed that she had the right to cross-examine witnesses. The court ordered the disciplinary committee to rehear the matter and, at that hearing, to allow the plaintiff to call any witnesses she wished and to cross-examine any witnesses presented against her, as the school rules provided. *Id.*, 281-82.

Princeton had not refused to allow the student to cross-examine adverse witnesses, but had failed to inform her in timely fashion that she had such a right. *Id.*, 281. While the term "good faith" was not used by the court, the court appears to have been saying that the university had a good faith contractual duty to timely inform the student that she had a right to cross-examine witnesses, in addition to its duty to protect the right as expressly stated in the student handbook.

Another issue to be considered is the bargaining strength of the contracting parties. The contract between a student and a school is almost always prescribed by the institution, with the student having virtually no bargaining power. Contracts of adhesion create one party that has no bargaining power or ability to participate in the drafting of the contract, making that party weaker. The Restatement of Contracts, dealing with standardized agreements, allows courts to consider the "reasonable expectations" of the weaker party. ***Restatement (Second) of Contracts***, §211. Standardized Agreements. Moreover, if an entity performs a service of "great importance to the public," the courts must give greater than usual scrutiny to the terms of the entity's

standardized contract with a weaker party. ***Restatement (Second) of Contracts***, §195. This power imbalance goes to the very essence of the "one-sided relationship" described by the ***Tedeschi*** court in reinstating a part-time student based on the school's failure to follow its own procedures. ***Tedeschi v. Wagner College***, 404 N.E.2d 1302, 1306 (N.Y. App. Ct. 1980).

Like the above cases, UNLV and the Nevada System of Higher Education (NSHE) has established a conduct codes and rules, published them in its handbook, published them on their website, and is requiring its students to live by those Codes. They too are required to honor it. By promising Plaintiff that she would have the right to be represented by counsel at her hearing, and then revoking that right just minutes before her hearing was to begin. Plaintiff relied not only upon the representations made in the NSHE Code, but also the express assurances in writing that she would be allowed to be represented by counsel. By conducting said hearing and refusing to allow Plaintiff to be represented by counsel, they breached their contract with Plaintiff. By failing to include the name of the complainant in the formal hearing notice, they breached their contract with Plaintiff. By finding Plaintiff responsible for an act, despite the fact that no evidence existed, thus violating Plaintiff's due process, they breached their contract with Plaintiff. By failing to correct these material failures on appeal, they breached their contract with Plaintiff. This cause of action is sufficiently plead in Plaintiff's Complaint.

2. NEGLIGENCE.

"To prevail on a negligence theory, a plaintiff must generally show that: (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty; (3) the breach was the legal cause of plaintiff's injury and (4) the plaintiff suffered damages." ***Doud v. Las Vegas Hilton Corporation***, 109 Nev. 1096, 864 P.2d 796 (Nev. 1993).

In the present case, Defendants' owed a duty of care to each of their students who paid tuition to be enrolled at their University. The Defendants breached that duty by refusing to treat Plaintiff with fundamental fairness and afford her the due process she was promised in Defendants' Student Conduct Code. Plaintiff has suffered severe damages as a result of the interruption in her education, future economic injuries, emotional damages and upset. For all of the foregoing reasons, this Honorable Court should deny Defendants' Motion to Dismiss on the negligence claim.

3. NEGLIGENT HIRING, TRAINING, AND SUPERVISION.

The duty of reasonable care in hiring has been established to ensure employers conduct reasonable background checks on potential employees, to ensure that the employee is fit for the position. ***Hall v. SSF, Inc.***, 930 P.2d 94, 98-99 (Nev. 1996); *quoting* ***Burnett v. C.B.A. Sec. Serv., Inc.***, 820 P.2d 750, 752 (Nev. 1991). The employer breaches this duty if it fails to conduct a reasonable background check or if the employer knew, or should have known, of an employee's dangerous propensities. See, ***Id.***

Additionally, employers can be held liable for negligently training their employees. ***Vinci v. Las Vegas Sands, Inc.***, 984 P.2d 750, 751 (Nev. 1999). Finally, when an employer actively supervises the employees, controls both the details and methods of how the employee performs their work, had the ability to terminate the employee's employment, the employers failure to supervise is subject to a claim of negligence. ***Rockwell, Jr. v. Sun Harbor Budget Suites***, 925 P.2d 1175, 1182 (Nev. 1996).

The individual Defendants in this case were employed and put in the positions they are in, despite not having the proper qualifications to understand and safeguard the constitutional and due process rights of students. Moreover, individual Defendants were not properly trained upon hiring and were not adequately supervised to ensure that the constitutional and due process rights of students were being protected. Even more egregious, Defendant UNLV and individual Defendants were aware that their employees were violating the constitutional rights of students, and violating the UNLV Student Conduct Code and NSHE Code, but turned a blind eye to this know behavior. As a result of the negligent hiring, training, and supervision, Plaintiff was subjected to a violation of her constitutional and civil rights.

4. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

In order to establish a cause of action for intentional infliction of emotional distress, a plaintiff must establish: (1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff suffered

severe or extreme emotional distress, and (3) actual or proximate causation. ***Olivero v. Lowe***, 116 Nev. 395, 398,995 P.2d 1023 (2000); ***Star v. Rabello***, 97 Nev. 124, 125, 625 P.2d 90 (1981). Extreme and outrageous conduct is that which is "'outside all possible bounds of decency' and is regarded as 'utterly intolerable in a civilized community.'" ***Maduike v. Agency Rent-A-Car***, 114 Nev. 1, 4, 953 P.2d 24 (1998).

In the case at bar, Plaintiff alleges and has set forth facts proving that the Defendants conduct constitutes: (1) extreme and outrageous conduct; (2) committed in reckless disregard of the probability that the Plaintiff would suffer severe emotional distress; (3) which resulted in Plaintiff suffering severe emotional distress; and (4) which was proximately caused by the Defendants acts. Defendants have acted with reckless disregard to the probability that the Plaintiff would suffer emotional distress by intentionally and falsely arresting Plaintiff and depriving her of due process. These actions were deliberately intended to hurt Plaintiff, despite the fact that as University officials, Defendants' were supposed to protect Plaintiff from harm.

5. CIVIL CONSPIRACY

A Plaintiff is entitled to go to trial on a claim on civil conspiracy, when the evidence presents a possible inference of such a conspiracy. ***United Steel Workers of America v. Phelps Dodge Corp.***, 865 F.2d 1539, 1546-47 (9th Cir. 1989). In that case, the Ninth Circuit held that Phelps Dodge's frequent interaction with the local police department, at least created an inference of a conspiracy that should be resolved by the finder of fact. ***Id.***

In the case at bar, Plaintiff's Complaint has presented numerous examples of the inseparable relationship between the Defendants. This direct evidence allows an inference to be drawn from the abundant circumstantial evidence that Plaintiff's claims are "justifiable" and "legitimate." ***Matsushita Electric v. Zenith Radio***, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356 (1986). The Defendants powerful stature, combined with their inseparable relationship with the each other, provide "undisputed background or contextual facts," ***T.W. Electrical Service v. Pacific Electrical Contractors***, 809 F.2d 626, 631 (9th Cir. 1987), from which the jury could legitimately draw inferences. The jury would be justified in inferring that the Defendants had both the ability and the opportunity to conspire with each other. The ability and opportunity to conspire, while insufficient alone, constitute circumstantial evidence of actual participation in the conspiracy. See ***Adickes v. S.H. Kress & Co.***, 398 U.S. 144, 158, 90 S.Ct. 1598, 1609 (1970). This circumstantial evidence does not stand alone, but rather serves to buttress the direct evidence and the permissible inferences arising from it. In addition an act done for a legitimate purpose in furtherance of a conspiracy may, together with other evidence, be evidence of a conspiratorial purpose. ***Braverman v. United States***, 317 U.S. 49, 53, 63 S.Ct. at 99, 101 (1942).

6. DEFAMATION, LIBEL, SLANDER PER SE.

As a general rule, a slanderous statement, no matter how insulting or defamatory, is not actionable unless actual or "special" damages are proven. ***Branda v. Sanford***, 97 Nev. 643 (1981); citing ***Modla v. Parker***, 495 P.2d 494 (Ariz.App.), *cert. denied* 409

U.S. 1038 (1972); ***Kirk v. Village of Hillcrest***, 335 N.E.2d 535 (Ill.App. 1975); W. Prosser, Law of Torts, 112 (4th ed. 1971). A statement is considered slander *per se*, *i.e.*, actionable without a showing of such special damages, only if it falls into one of usually four categories: (1) imputations that plaintiff has committed a crime; (2) imputations that would injure plaintiff's trade, business or office; (3) imputations that the plaintiff has contracted a loathsome disease; and, the category relevant for our purposes, (4) imputations of unchastity in a woman. ***Branda***, 97 Nev. at 646; citing ***Atkinson v. Equitable Life Assur. Soc'y***, 519 F.2d 1112 (5th Cir. 1975) (Florida law); ***Gulf Constr. Co. v. Mott***, 442 S.W.2d 778 (Tex.Civ.App. 1969); ***Restatement (Second) of Torts*** § 570 (1977).

Defendants made numerous statements that Plaintiff was a violent criminal, thus severely harming her reputation. These statements meet the first criteria for slander per se, as an imputation that Plaintiff has committed a crime. ***Branda***, 97 Nev. at 646.

It is generally accepted that for both libel and slander it is a question of law and, therefore, within the province of the court, to determine if a statement is capable of a defamatory construction. ***Branda***, 97 Nev. at 646; *citing* ***Thompson v. Powning***, 15 Nev. 195 (1880); R. Sack, ***Libel, Slander and Related Problems***, 72 (P.L.I. 1980). If susceptible to different constructions, one of which is defamatory, resolution of the ambiguity is a question of fact for the jury. *Thompson*, supra.

Plaintiff intends to present evidence and witnesses to establish that these statements by Defendant are

completely false, and damaged Plaintiff. As a result, Plaintiff's cause of action for defamation, libel and slander per se should not be dismissed.

7. MALICIOUS PROSECUTION / ABUSE OF PROCESS

In Nevada, the elements of a malicious prosecution claim are: "(1) want of probable cause to initiate the prior criminal proceeding; (2) malice; (3) termination of the prior criminal proceedings; and (4) damage." ***LaMantia v. Redisi***, 38 P.3d 877, 879 (Nev. 2002). "A malicious prosecution claim requires that the defendant initiated, procured the institution of, **or** actively participated in the continuation or a criminal proceeding against the plaintiff." ***Id.*** at 879-880(emphasis added).

The two elements required to establish the tort of abuse of process are: "(1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding." ***Posadas v. City of Reno***, 109 Nev. 448, 457, 851 P.2d 438, 444-45 (1993), *citing* ***Kovacs v. Acosta***, 106 Nev. 57, 59, 787 P.2d 368, 369 (1990). An ulterior purpose is any improper motive underlying the issuance of legal process. ***Laxalt v. McClatchy***, 622 F.Supp. 737, 751 (D.Nev.1985). A showing of malice and want of probable cause is not necessary to recover for abuse of process. ***Bull v. McCuskey***, 96 Nev. 706, 709, 615 P.2d 957, 960 (1980), *overruled in part on other grounds by* ***Ace Truck v. Kahn***, 103 Nev. 503, 746 P.2d 132 (1987); ***Nevada Credit Rating Bur. v. Williams***, 88 Nev. 601, 606, 503 P.2d 9, 12 (1972). In ***Bull***, this court upheld a jury award for abuse of process where

the respondent's attorney, with knowledge that there was no basis for the claim, brought suit against a physician for medical malpractice with the ulterior purpose of coercing a nuisance claim settlement. ***Bull***, 96 Nev. at 707, 709, 615 P.2d at 959-60. In ***Nevada Credit Rating Bur.***, this court sustained an award for abuse of process where the respondent attached property valued greatly in excess of the alleged debt with the ulterior purpose of coercing payment. ***Nevada Credit Rating Bur.***, 88 Nev. at 606-07, 503 P.2d at 12-13.

In ***Posadas***, the Nevada Supreme Court ruled that the district court erred in granting summary judgment to the City of Reno on the issue of abuse of process. ***Id***. In that case, the plaintiff alleged that the City filed criminal charges against him for the purpose of forcing him to resign his position as a police officer. ***Id***. Likewise, the only reason Defendants brought charges against Plaintiff was an attempt to protect their star athlete, and later, to justify the false arrest of Plaintiff and attempt to hinder any civil claims she may have.

Defendants clearly did not have any legal authority to arrest and jail Plaintiff. Moreover, Defendants certainly did not have any basis to trump up bogus student conduct code charges against Plaintiff, other than to retaliate against her for asserting her constitutional rights, and attempt to justify the arrest of Plaintiff.

F. IN THE EVENT THAT THIS COURT IS INCLINED TO GRANT ANY PORTION OF DEFENDANTS' MOTION, PLAINTIFF REQUESTS LEAVE TO AMEND COMPLAINT.

While Fed. R. Civ. P. 15 places leave to amend within the sound discretion of the trial court, the 9th Circuit has stressed that a court must remain guided by "the underlying purpose of Rule 15 . . . to facilitate decision on the merits, rather than on the pleadings or technicalities." ***United States v. Webb***, 655 F.2d 977, 979 (9th Cir. 1981); *see also* ***Conley v. Gibson***, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

The standard for granting leave to amend is generous. In ***Scott v. Eversole Mortuary***, 522 F.2d 1110, 1116 (9th Cir. 1975) the 9th Circuit reversed the district court's dismissal of plaintiff's count insofar as it denied leave to amend because it could "conceive of facts" that would render plaintiff's claim viable and could "discern from the record no reason why leave to amend should be denied." Similarly, in ***Breier v. Northern California Bowling Proprietors' Ass'n***, 316 F.2d 787, 789-90 (9th Cir. 1963) this Court held that leave to amend should be granted if underlying facts provide proper grounds for relief or if the complaint can be saved by amendment. Leave to amend should be granted "if it appears at all possible that the plaintiff can correct the defect." *Id.* at 790 (quoting 3 Moore, Federal Practice, § 15.10 at 838 (2d ed. 1948)).

The factual history of the events giving rise to this litigation are extensive. In the unlikely event that this Court were to find any of Plaintiff's causes of action

insufficient, leave to amend is graciously requested. Plaintiff strongly believes that this Court could "conceive of facts" that would render his claims valid, if he were permitted to amend. ***Scott v. Eversole Mortuary***, 522 F.2d 1110 (9th Cir. 1975).

III.

CONCLUSION

Having established that Plaintiff's Complaint is sufficiently plead, and that each cause of action sufficiently states a claim for which relief may be granted, Plaintiff prays that this Court will deny all Defendants' Motion to Dismiss.

DATED this 10th day of July, 2008.

THE BACH LAW FIRM, LLC

By: */s/ Jason J. Bach*
JASON J. BACH, ESQ.
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Attorney for Plaintiff

[*Certificate of Service omitted in printing this appendix*]

* * *

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
THE HONORABLE JAMES C. MAHAN, JUDGE PRESIDING

NO. 2:08-CV-0417-JCM-GWF

[Filed November 25, 2008]

MEGAN KRAINSKI,	)
	)
Plaintiff,	)
	)
vs.	)
	)
STATE OF NEVADA EX. REL. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, et al.,	)
	)
Defendants.	)

MOTION HEARING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TUESDAY, OCTOBER 14, 2008

1:30 P.M.

APPEARANCES:

For the Plaintiff: JASON BACH, ESQ.

For the Defendants: RICHARD LINSTROM, ESQ.
CHRISTIAN GABROY, ESQ.

Reported by: Joy Garner, CCR 275
Official Federal Court Reporter

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LAS VEGAS, NEVADA, TUESDAY,
OCTOBER 14, 2008

1:30 P.M.

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P R O C E E D I N G S

THE CLERK: This is the time set for the hearing of Defendant Kenya Polee's motion to dismiss, Civil Case Number 2:08-CV-0417-JCM-GWF, Megan Krainski versus State of Nevada, and all others.

Counsel, please note your appearance for the record.

THE COURT: Mr. Bach?

MR. BACH: Jason Bach on behalf of the plaintiff.

THE COURT: Thank you.

Mr. Linstrom?

MR. LINSTROM: Your Honor, Richard Linstrom here for the state defendants.

THE COURT: Thank you.

MR. GABROY: Judge, Christian Gabroy on behalf of Defendant Kenya Polee and Third-Party Plaintiff Kenya Polee.

THE COURT: All right. Thank you.

All right, I've reviewed this

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with my brain trust. Let me tell you what I'm inclined to do, and I'll give you all a chance to argue. What I'm inclined to do is to dismiss the federal claims and let me tell you the rationale. I think the Eleventh Amendment bars a lawsuit against the state, you know, sovereign -- unless the state waives sovereign immunity.

UNLV is a state instrumentality and its employees are state employees protected in their official capacities by the Eleventh Amendment. As far as the employees acting in their individual capacities, I think they are entitled to qualified immunity. State officials in their individual capacity are protected from civil liability arising from discretionary acts that do not violate clearly established constitutional rights.

And, of course, the case that you've all referred to, Saucier versus Katz, but first to -- the first inquiry is whether an official's conduct violated the person's constitutional rights. And then, second, the

constitutional rights were clearly established at the time of the incident so that a reasonable official would have known that this conduct was

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unlawful.

And here it seemed like there are three constitutional claims. One is procedural due process, but if you look at the cases that the defendants cite, and Dixon versus Alabama State Board of Education which, of course, is Fifth Circuit, but the Goss case which is a United States Supreme Court case, but in Goss the Goss Court held that due process does not require even the opportunity to secure counsel to confront and cross-examine the witnesses supporting the charge or to call her own witnesses to verify her version of the incident.

I mean so it's an very limited procedural due process. Counsel is not a required element of student due process claims, and so it seems like the due process claim just doesn't pertain. As far as substantive due process -- does she pronounce her name Kreenski (phonetic) or Kranski (phonetic)?

MR. BACH: Krainski.

THE COURT: Krainski -- failed to allege any fundamental liberty or property interest that should be protected by the court

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aside from those associated with the due process claim. I'm turning now to substantive due process, but again she failed to allege any fundamental liberty or property interests that should be protected by the court apart from those that were raised in the procedural due process claim.

Now, the third possible federal claim is search and seizure, the Fourth Amendment and whether -- the question is whether a reasonable officer would have believed that there was cause to believe that a crime had been committed and the suspect had committed that crime. Here Krainski was charged with a crime. She was not exonerated from the charges that she alleges, rather the court minutes reflect that she was initially charged with a felony. The charged was reduced to a misdemeanor, and then the charge was eventually dismissed with a diversion that she successfully completed.

So there are no federal claims then remaining from the plaintiff, and so what I would be inclined to do then is not to keep the state court claims, but to send you to state court to litigate any of those claims, but I just

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don't see -- I'm a court of limited jurisdiction and I don't see any federal court claim here.

Now, Mr. Linstrom, you can talk me out of that. It's your motion so you get the first bite at the apple.

MR. LINSTROM: We'll submit, your Honor.

MR. GABROY: Nothing, your Honor.

THE COURT: All right, Mr. Bach?

MR. BACH: Your Honor, just briefly. You've addressed all the issues that pertain to the motion to dismiss. The issue of substantive due process, the fundamental argument that we're making here is that this was essentially a conspiracy concocted by certain defendants, not all of the defendants, but certainly Defendant Pini and Wallenfeldt along with Defendant Polee to basically set up Ms. Krainski to be arrested so to -- essentially to get her kicked out of this room. It's a retaliation argument if that is true.

THE COURT: But she could have a fundamental right to be on the track team for that to pertain, doesn't she?

MR. BACH: No, my client as an

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individual is not on the track team. She was just a student.

THE COURT: Oh, all right.

MR. BACH: And we're arguing she has a fundamental right to be a student.

THE COURT: All right.

MR. BACH: And as having that fundamental right as a student, she also has a right not to be conspired against to be kicked out of school or -- you know, she wasn't eventually kicked out of school, but that's ultimately what they were hoping to do here, but they were successful in having her arrested. They were successful in having the Student Conduct Code Board take action against her. We argue that under Goss she does have a fundamental right to an education. She has a right not to be conspired against and retaliated against because she had an issue with the star athlete.

Dealing with the issue of the Fourth Amendment exoneration and whether or not she was or was not exonerated, what the court minutes reflect is that the matter was submitted to the judge. Judge Bennett did not make a finding of guilt. There is no judgment of guilt.

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There was nothing. Now, the fact that the minutes reflect that the defendant in that case -- the plaintiff in this case -- entered into some sort of diversion program where she'd take an impulse control class.

The fact that she had already done so at the time of the hearing, the judge then dismissed the matter. There was no adjudication in that matter. A diversion perhaps, an adjudication of guilty, no. All there is is an exoneration, and the matter was dismissed.

THE COURT: Well, except a dismissal is not an exoneration. A matter can be dismissed for any number of reasons. I mean let's say that I bring a

charge against somebody and then I fail to show up and the judge says, well, where is Mr. Mahan? He's supposed to prosecute the claim. Well, he's not here. All right, then the case is dismissed. I mean let's assume that you assault and batter me and so I'm in a cast and there's no question that you committed this, but if I fail to show up, the judge is going to say, where's the complaining witness? Well, he's not here, your Honor. Okay, well, dismissed then.

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Do you understand what I'm saying? Not that you were exonerated, but there are a lot of things that can make a case be dismissed. It's not like if you're dismissed, that equals exoneration.

MR. BACH: Right, I understand. Perhaps in the -- the courts haven't necessarily been crystal clear on this issue of what constitutes exoneration for the purposes of a 1983 case. In fact, even within the Ninth Circuit there seems to me some split decisions as to what exoneration means.

THE COURT: We are talking about the Ninth Circuit, so there is always going to be cases on every side.

MR. BACH: Sure, absolutely. So we would ask that the Court reconsider it's position on that issue.

THE COURT: Okay, all right.

MR. BACH: And reconsider the issue of substantive due process and whether or not our client had a right to be free from these individuals within the

university conspiring and retaliating against her. You know, that's not a procedural due process issue. That's a

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substantive due process issue because she has a fundamental right to an education, and there is certainly nothing within the Student Conduct Code that addresses the issue of university employees retaliating against a student, but as a substantive due process issue, we would ask that you reconsider on that issue as well.

THE COURT: All right.

Mr. Linstrom?

MR. LINSTROM: Your Honor, I believe most of these questions have been addressed by our pleadings, but just in terms of the exoneration issue, I think it's only relevant in terms of was there grounds for the arrest, and the facts pled by plaintiff even say that, well, the police knew or should have known that they received a false report.

Well, we know that the report itself can be the basis for a valid arrest and a basis for probable cause, therefore, in some ways the exoneration is almost, I would say, beside the point in terms of the 1983 action. The other thing I would suggest is the term "retaliation" is not properly used in this context because that talks about action taken in response to or in

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punishment for exercising a legitimate right.

THE COURT: That's right.

MR. LINSTROM: The fact that people maybe by the time they get around to doing the disciplinary hearing don't care for someone --

THE COURT: Well, retaliation, that's your point. Retaliation is you do something, like you report me to the authorities, and I say, okay, I'm going to retaliate against you have, Mr. Linstrom, and not just attack you somehow. I mean retaliation is -- retaliation is like payback if you will, and it's just not here. It's not pled.

MR. LINSTROM: Right, and that wasn't what was pled. This is not -- it wasn't pled as a retaliation. It was pled as a civil rights violation, and I believe we've taken care of those or confronted those issues in our original reply.

THE COURT: Yeah.

MR. LINSTROM: Thank you.

THE COURT: Thank you. And I just don't see the federal claims and I'm not inclined to keep the -- I'm a Court of limited jurisdiction. I'm not inclined to keep the state

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law claims here. So what I'm inclined to do is to dismiss the lawsuit and let you bring it, if you want to,

in state court, but again on the merits, and I think I've told you I think the state officials in their official capacity are entitled to protection under the Eleventh Amendment.

So now there is a hearing tomorrow. I understand we've got more motions coming up tomorrow. I don't know whether they are now rendered moot.

MR. LINSTROM: Your Honor, just so I'm clear, the motion for sanctions that was also on today, I take it the Court is looking at that as moot.

THE COURT: Yeah, and I just don't think that's -- I think it's litigation, and so I'm inclined to deny that. Thank you. Yeah, you're right, and I'm going to deny that.

MR. GABROY: And then, Judge, tomorrow the motions involve my third-party complaint --

THE COURT: Right.

MR. GABROY: -- against the university involving the student athlete that we allege that there was a right violated to the level of a 1983

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action against the university. That's scheduled for 10:00 a.m. tomorrow.

THE COURT: So, all right, we'll deal with that tomorrow then. All right.

MR. GABROY: Thank you, Judge.

THE COURT: All right. So, Mr. Linstrom, if you would, prepare an appropriate order granting your motion and denying the motion for sanctions.

MR. LINSTROM: Very well. Thank you.

THE COURT: Thank you. We will be in recess.

(Whereupon, the proceedings concluded.)

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter.

Date: November 24, 2008 /s/ Joy Garner
JOY GARNER, CCR 275
U.S. Court Reporter